80-889

Supreme Court, U. S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLERK

NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MUHAMMAD F. MALIK, Petitioner

V.

HIDDEN VALLEY Civic Club and
GEORGE A. TURNER, Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Texas by and through its laws, rules, courts and officials denied Petitioner his right to appeal an infirm, adverse State court decision in violation of the Fourteenth Amendment to the United States Constitution when the State caused Petitioner to default on a state procedural rule and Petitioner was prejudiced thereby.

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OPINIONS BELOW

The Texas Supreme Court did not issue an opinion in this case, but rather Notified Petitioner by postcard that his Application for Writ of Error was refused finding no reversible error, a photostatic copy of which is found in Appendix A hereto, infra, page 1. A photostatic copy of the Judgement and Opinion of the Court of Civil Appeals for the 1st Supreme Judicial District of Texas is found in Appendix B hereto, infra, page 1. A photostatic copy of the Order of Permanent Injunction of the 125th District Court of Harris County, Texas, is found in Appendix C hereto, infra, page 1.

JURISDICTION

The judgement of the Supreme Court of Texas was entered on September 10, 1980. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3). Also, 28 U.S.C. Section 2403(b) may be applicable.

CONSTITUTION AND STATUTES

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said Section reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Article 4591, Vernon's Annotated Civil Statutes ("V.A.C.S."). This Article reads as follows:

"The first day of January, the third Monday in February, the second day of March, the 21st day of August, the first Monday in September, the second Monday in October, the 11th day of November, the fourth Thursday in November, and

the 25th day of December, of each year, and every day on which an election is held throughout the state, are declared legal holidays, on which all public offices of the state may be closed and shall be considered and treated as Sunday for all purposes regarding the presenting for the payment or acceptance and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes placed by the law upon the footing of bills of exchange. The nineteenth day of January shall be known as "Confederate Heroes Day" in honor of Jefferson Davis, Robert E. Lee and other Confederate heroes."

This case also involves Article 2372h-1, V.A.C.S. Said Article provides in relevant part as follows:

"In each county of this State, each elected county officer or the Commissioner's Court, as the case may be, shall have authority to provide for vacations, holidays fixed by State law, and sick leaves, without deduction or loss of pay, and to provide for deductions for absences, for the employees working under the elected county officer or his appointees, regardless of whether the employee is

paid on a fixed salary basis or on the basis of an hourly or daily wage. . ."

This case also involves General and Special Laws of Texas, Vol. 2, Chapter 843, V.A.C.S. This law provides in relevant part as follows:

"Employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on. . . December 24."

This case also involves Rules of Civil Procedure (Texas), Rule 329b(1), Texas Rules of Civil Procedure (T.R.C.P.). Said Rule provides as follows:

"A motion for new trial, if filed, shall be filed within ten (10) days after the judgement or other order complained of is rendered."

This case also involves Rule 4, T.R.C.P. Said Rule provides as follows:

"In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period

so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday."

.....

STATEMENT OF THE CASE

In early 1979, certain members of the Hidden Valley Civic Club ("the Civic Club"), which comprises approximately 300 dues paying members of residents and lot owners of the Hidden Valley subdivision of Houston Harris County, Texas, observed Petitioner MUHAMMAD F. MALIK, a United States citizen of Pakistan origin and of the Muslim faith, placing what they believed to be two (2) mercury security lights in his front yard.

The attorney for the Civic Club contacted petitioner by U.S. mail informing him that he was in violation of certain deed restrictions. The attorney's letter was dated April 10, 1979. Shortly thereafter, on April 16, 1979, petitioner contacted the attorney for the Civic Club stating that he did not believe he was in violation of the deed restrictions but that he would like the attorney to underline the deed restrictions that were allegedly being violated. Petitioner enclosed a copy of his deed restrictions in the letter to said attorney, but the attorney did not respond although he received the letter.

On May 11, 1979, respondent Hidden Valley Civic Club commenced suit in the 11th Judicial District Court of Harris County, Texas, requesting, inter alia, a temporary and permanent mandatory injunction ordering petitioner herein and defendant in the above cause to remove the two (2) security lights that were the subject of that cause. Petitioner was ordered therein to show cause why the two (2) lights should not be removed. On June 7, 1979, the petitioner appeared in the 190th Judicial District Court and specially excepted to the Civic Club being a plaintiff in the cause since it was not given standing to bring such an action in the deed restrictions. That is, the Civic Club was not an owner of a lot within the Addition, citing Garden Oaks Board of Trustees v. Gibbs. Petitioner in his answer also denied that he installed two (2) security lights in his yard, but only one. Petitioner prayed that the case be dismissed.

The 190th District Court overruled the special exception and signed and rendered a temporary injunction which omitted reference to the security lights in question.

On June 11, 1979, the Civic Club requested a preferential setting for the week of July 23, 1979, to which it was entitled as a matter of law. However, the motion was denied by Judge Jack Smith of the 189th District Court on June 12, 1979. Shortly thereafter, on June 21, 1979, petitioner filed an application for trial by jury which was granted as a matter of right. However, on June 29, 1979, respondent GEORGE A. TURNER was joined as a party plaintiff when plaintiffs filed their First Amended Original Petition.

On August 8, 1979, respondents requested preferential setting for the second time as a matter of law for trial the week of October 15, 1979. On August 13, 1979, Judge Ruby Sandock of the 234th District Court granted the preferential setting.

On October 15, 1979, petitioner filed Defendant's Amended Answer again specially excepting to the Civic Club being included as a party plaintiff and requested that the Civic Club should be dismissed. Judge Charles L. Price of the 125 District Court indicated he would take the motion under consideration during trial.

On October 16, 1979, trial by jury commenced in the 125th District Court.

On October 17, 1979, after the respondents herein had concluded evidence in their case, petitioner herein moved the court for instructed verdict. Apparently, the court carried the motion along with petitioner's case, for he apparently overruled Defendant's Motion for Instructed Verdict after the conclusion of evidence of petitioner herein and hearing more evidence from respondents herein. Petitioner and respondents then rested their respective case. Thereafter, the court prepared the charge of the court and both parties made their objections and exceptions thereto, and submitted their own charge or special issues. The court, thereafter, dismissed the Civic Club as a plaintiff before the jury was seated and charged by the court. Respective counsels presented their arguments before the court sent the case to the jury. The jury reached a ten (10) to two (2) verdict and returned the same to the court. The court received the verdict and ordered the filing thereof among the papers of said cause, and thereafter the court duly discharged the jury.

On October 23, 1979, respondent TURNER filed his Motion for Judgement on Findings of Jury. However, on November 7, 1979, petitioner filed his Opposition to Plaintiff's Motion for Judgement on Findings of Jury and Defendant's Motion for Judgement Non Obstante Veredicto. On November 12, 1979, the court held a hearing on the above motions and the court found, inter alia, that the evidence was insufficient to support a finding that both of the relevant security lights were installed upon defendant's, petitioner herein, premises. However, the court ordered petitioner herein to remove his security light within forth-five (45) days from the date of signing the order.

On December 13, 1979, the court signed and rendered the Order of Permanent Injunction. (See Appendix C, page 1).

A. Status of Law During This Period. Rule 329b(1) of the Texas Rules of Civil Procedure ("T.R.C.P."), grants applicants ten (10) days to file a motion for new trial after judgement has been rendered. Rule 4 T.C.R.P. provides in relevant part as follows:

> "In computing any period of time prescribed or allowed by these rules . . . The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday."

The source of Rule 4 is stated to be Federal Rule 6(a).

Until July 25, 1979, it was generally held that legal holidays in the state of Texas were enumerated in Article 4591, Vernons Annotated Civil Statutes (V.A.C.S.). On that date, the Texas Supreme Court held in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex. Spr. Crt. 1979) that Monday, January 2, 1978, was a "legal holiday for procedural purposes" within the meaning of Rule 4, T.R.C.P. even though January 2, 1978, was not listed as one of the enumerated legal holidays under Article 4591. In fact, at all relevant times stated herein, the Texas Court of Civil Appeals for the 1st Supreme Judicial

District had held as much in Seismic & Digital Concepts, Inc. v. Digital Resources Corporation, 583 S.W.2d 442 (Tex. Civ. App. - Houston [1st Dist.] 1979. In Seismic & Digital Concepts, appellant therein sought an extension of time in which to file a statement of facts under the mandatory fifteen (15) day time limit of Rule 21c, T.R.C.P. In that case, the fifteen (15) day period ended on April 13, 1979, which was "Good Friday". The Texas Court of Appeals for the 1st Supreme Judicial District held that since the attorney for appellant did not call said Court of Civil Appeals directly, but instead relied on information relayed to him on April 12, 1979, by the Harris County Switchboard Operator that April 13, 1979, was a legal holiday and that the courthouse would be closed, appellant failed to file his motion within the mandatory time limit when, in fact, court personnel were present the entire day of April 13, 1979, i.e. Good Friday.

STATEMENT OF CASE CONTINUING

Under Rules 329b(1) and Rule 4, T.R.C.P., the last day for petitioner herein to timely file a motion for new trial would have been on December 24, 1979,

unless it was considered a holiday for procedural purposes. On the morning of December 24, 1979, which is generally known as Christmas Eve, petitioner's attorney telephoned the Harris County Switchboard Operator regarding filing a motion for new trial, and said operator informed said attorney that the Office of Ray Hardy, District Clerk of Harris County, was closed due to December 24, 1979, being a holiday. (See copy of affidavit of Ray Hardy labeled Appendix D, page 1; the original of which is among the papers filed in the federal removal proceedings Hidden Valley Civic Club, et al v. Muhammad F. Malik, Civil Action No. H-80-806 with the United States Federal District Clerk for the Southern District of Texas, Houston Division, on April 11, 1980; see Appendix D, page 2.)

In a further attempt to file the motion for new trial, petitioner's attorney proceeded to the Harris County Civil Court Building where such motions are filed. However, the attorney discovered the doors of the building were locked and a sign on the door informed him that due to December 24, 1979, being a holiday, it was closed. There were no signs or

notices directing said attorney to a place, if any, where such motions could be filed. Petitioner's attorney had practiced law in Harris County, Texas for four and one-half years (4-1/2) at that time, including three (3) years with the Texas Attorney General and had never known or heard of a place other than the Fourth Floor of the Harris County Civil Courts Building where such motions may be filed. In fact, no other attorney in Harris County, Texas, that petitioner's attorney has questioned since the date of Mr. Hardy's affidavit has heard of such a procedure with the exception of respondents' attorney.

Since the Harris County District Clerk's Office was also closed on December 25, 1979, Christmas, it was not until December 26, 1979, that petitioner could and did file his motion for a new trial in the 125th District Court. In said motion, petitioner set forth the clear state law with respect to a cause that has been submitted to the jury on special issues. In short, petitioner set forth in his motion that material issues must be answered by the jury, and if in hopeless conflict and cannot be reconciled,

the judge cannot alter the verdict, and in such case the findings destroy each other and amount to no verdict and compel a mistrial. See Blanton v. E & L. Transport Co., 146 Tex. 377, 207 S.W.2d 443, 445 (1950); Bay Petroleum Corp. v. Crumpler, 372 S.W.2d 318 (1963); Bradford v. Arhelger, 340 S.W.2d 772 (1960); and Bell Cab Co. v. Vasquez, 434 S.W.2d 714 (1968). In said motion, petitioner stated that the same result follows when the conflict is between answers to a general issue and to a specific issue necessarily included within the general, or is between answers to an "ultimate" issue and to an "evidentiary" issue necessarily included within the "ultimate"; from this it follows that even though a conflicting finding be in reply to a special issue which should not have been submitted, because already covered by other special issues, yet the destructive finding may force a mistrial. See Panhandle v. Byrd, 106 S.W.2d 660 (1937); also see Ellis v. State 27 Tex. App. 190, 11 S.W.111 (1889) and Crosby v. Stevens, 184 S.W.2d 705 (1916).

In the trial court below, the jury reputedly found in its answer to Issue No. 2 that defendant's, petitioner herein, security lights on his lot amounted to a substantial violation of the deed restrictions, and reputedly found in its answer to Issue No. 3 that petitioner installed two (2) lights on his lot. Subsequently, however, the court had found that the evidence was insufficient to support a finding that both of the two (2) security lights were installed upon petitioner's lot. On the other hand, in its answer to Issue No. 5, the jury reputedly found that other similar security lights in the relevant geographical area were not a substantial violation of said restrictions. Thus, the jury in essence made a finding that a security light in the neighborhood, which was not on petitioner's lot, was a substantial violation in its answer to a specific (evidentiary) issue, then subsequently came to a clearly conflicting answer to the general issue that there were no other substantial violations in the neighborhood besides petitioner. Petitioner had affirmatively pleaded, inter alia, waiver and estoppel.

On January 28, 1980, after hearing on the motion for new trial, the trial court once more denied petitioner a clear legal right he sought to exercise.

On February 22, 1980, petitioner filed his motion to extend time to file transcript and statement of facts with the Court of Civil Appeals until March 28, 1980. Petitioner filed his appeal bond pursuant to Rule 356, T.R.C.P. on February 26, 1980, and pursuant to request by telephone by the clerk of the Court of Civil Appeals, petitioner mailed a letter to said clerk advising her of the date petitioner's motion for new trial was filed. On March 3, 1980, however, respondents filed their opposition to extend time for filing alleging, inter alia, that petitioner already had until March 28, 1980, to file the record on appeal under Rule 386, T.R.C.P. However, on March 5, 1980, respondents filed their first amended opposition to petitioner's motion for extension of time to file the record on appeal alleging that the Court of Civil Appeals lacked appellate jurisdiction based on the allegation that petitioners motion for new trial was filed tardy.

On March 6, 1980, the Court of Civil Appeals extended petitioner's time to file the transcript and statement of facts to and including March 28, 1980. On March 10, 1980, petitioner filed his response to respondents' first amended opposition and respondents filed their motion for contempt in the 125th District Court for failure of petitioner to remove his security light and that he be confined to jail. On March 11, 1980, petitioner delivered the transcript to the clerk who refused to file the same. On March 18, 1980, petitioner delivered the statement of facts to said clerk who refused to file same. Earlier, on March 14, 1980, petitioner filed a supersedeas bond in the amount of $2000.00, and on March 19, 1980, filed an additional supersedeas bond pursuant to request by respondents.

On April 10, 1980, however, the Court of Civil Appeals, after ordering the transcript and statement of facts filed, dismissed petitioner's appeal for want of jurisdiction. (See Appendix B, page 1). On that same day, petitioner filed his motion for rehearing (See Appendix D, infra), pages 5 and 6. On April 11, 1980, petitioner

removed the proceedings in the 125th District Court, the trial court, to the United States District Court for the Southern District of Texas, Houston Division, and filed a copy with the 125th District Court. (See Appendix D, infra, page 2).

On April 14, 1980, petitioner filed an amendment of his motion for rehearing in the Court of Civil Appeals (See Appendix D, infra, pages 7 and 8) and hand delivered a copy of petitioner's removal petition to the Judge of the trial court who had not received the earlier copy filed late the preceeding Friday with the clerk, thereby removing the contempt proceedings scheduled for that day.

On or about April 17, 1980, respondents filed their motion to remand the contempt proceedings back to the state trial court and on April 22, 1980, the federal district court gave notice that respondents' motion to remand had been placed on the court's motion docket for May 12, 1980.

On April 24, 1980, the Court of Civil Appeals overruled petitioner's motion for rehearing, and on April 25, 1980,

within the fifteen (15) day period for filing amendments to motions for rehearing, petitioner filed his supplemental motion for rehearing. (See Appendix D, infra, pages 9 thru 12). On the same day, respondents filed their motion in support of overruling motion for rehearing.

On May 8, 1980, the Court of Civil Appeals refused petitioner's supplemental motion.

On or about May 8, 1980, petitioner filed with the federal clerk his response to respondents' motion to remand and on May 12, 1980, the federal district court held a hearing on respondents' motion to remand. The federal district court took the matter under advisement.

On May 16, 1980, petitioner deposited his application for writ of error to the Texas Supreme Court with the Court of Civil Appeals, and said application was filed with the Texas Supreme Court on June 2, 1980. (See Appendix D, infra, pages 13 thru 31).

On June 6, 1980, the federal district court remanded the contempt proceedings to the state trial court.

On June 17, 1980, the Texas Supreme Court received and filed respondents' reply to application for writ of error.

On or about June 18, 1980, respondents reset their motion for contempt in the 125th District Court for July 14, 1980. However, on July 14, 1980, petitioner specially excepted and opposed respondents motion for contempt, and after a hearing thereon, the court, surprisingly, ruled in petitioner's favor and dismissed respondent's motion for contempt.

On September 10, 1980, the Texas Supreme Court refused petitioner's application for writ of error, finding no reversible error. (See Appendix A, page 1.)

Petitioner gave notice on or about October 2, 1980, to the clerks of the Texas Supreme Court, the Court of Civil Appeals and the District Court of Harris County that he intended to file a petition for writ of certiorari in the Supreme Court of the United States.

Thus, after a long, winding and tiresome journey, petitioner now hopes to reach the ear of the Honorable Supreme Court of the United States who can

correct the infirmities that have occurred below. The Texas state courts, which judges are duly elected by their respective constituents, have been faced, not only with the duty of applying the fair and correct law in the case, but also with the choice of ruling in favor of what could realistically be conceived of as approximately three hundred (300) or more voting residents or a sole United States citizen of Pakistani origin and of the Muslim faith.

REASONS FOR GRANTING THE WRIT

It is clear that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. Lindsey v. Normet, 92 S.Ct. 862, 405 U.S. 56 (1972). However, where a state provides appellate review, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, Id. Moreover, due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access

to the courts. Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970). "Equal protection of the law" implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination. Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040.

As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). However, where state procedural rules are concerned, a petitioner can show "cause" for failure to follow a state procedural rule and "prejudice" resulting to him from that state procedural default. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Moreover, even

assuming the state has a strong interest in requiring strict compliance of a state procedural rule, that assumption is inapplicable in a case in which the action of the state court itself made necessary the procedural default that occurred. See White v. Estelle, 566 F.2d 500 (5th 1978).

THE FACTS

On December 13, 1979, the state trial court rendered judgement. Under the ten (10) day rule embodied in Rule 329b(1), T.R.C.P., the last day to timely file a motion for a new trial was on December 24, 1979, unless it was considered a holiday for procedural purposes. On the morning of Christmas Eve, petitioner's attorney telephoned the Harris County Switchboard Operator and was informed that the district clerk's office was closed due to that day being a holiday. Wanting to make sure that the district clerk's office was closed, in the early afternoon of the same day, petitioner's attorney proceeded to the Harris County Civil Courts Building where motions for new trial in civil cases are filed. However, having arrived at said courthouse, petitioner's attorney discovered

the doors of the building were locked and a sign on the door informed him that due to December 24, 1979, being a holiday, it was closed. There were no signs or notices directing petitioner's attorney to a place, if any, where such motions could be filed. (See Appendix D, page 1).

On the other hand, the affidavit of the pertinent district clerk of Harris County, Ray Hardy, indicates that certain classes of attorneys could have filed a motion for new trial on Christmas Eve 1979: (1) those attorneys who call the Harris County Switchboard Operator and receive the telephone number of an appropriate person to contact in case of an emergency; and (2) those attorney's who personally know the district clerk or his deputy and their telephone numbers and feel free to call these gentlemen at home on holidays such as Christmas Eve when their office is closed to others. Of course, all this assumes that the filing would be classified as "an emergency," for if the deputy clerk determined December 24, 1979, was "a holiday for procedural purposes" or

otherwise believed the filing date would be extended, the filing, presumably, would not be permitted. If fact, the relevant case law at that time would seem to hold that the filing date would be extended. See Mid-Continent Refrigerator Company v. Tackett, supra; and Seismic & Digital Concepts, Inc. v. Digital Resources Corporation, supra.

Petitioner's attorney did not personally know, or know at all, either the district clerk or his chief deputy, which is not uncommon in a city the size of Houston, Harris County, Texas, where thousands of attorneys compete to make a living. Even if petitioner's attorney knew the telephone numbers of the district clerk or his chief deputy, which he did not know, without knowing it was necessary and he was entitled to call these persons on Christmas Eve regarding filing a motion, out of common, human courtesy, he would not have felt free to call said persons regarding making special provisions for him to file a motion that day. Nor would said attorney have had any reasonable expectations that the district clerk or chief deputy would make special arrangements for filing a motion on Christmas Eve, their holiday from work.

Although petitioner's attorney called the switchboard operator and inquired about the filing of a motion for new trial, said operator did not give him any information regarding the same. Thus, due to the district clerk's office being closed, due to petitioner's attorney not personally knowing the district clerk and due to the county switchboard operator not informing said attorney of vital information of which he was entitled, petitioner failed to follow a state procedural rule. Petitioner was thereby denied his right to appeal his case in the state courts where he probably would have prevailed due to a conflicting jury verdict on special issues.

Petitioner avers that he was capriciously and arbitrarily denied his right to appeal in violation of due process and equal protection of the law. Lindsey v. Normet, supra. Petitioner further alleges that the Texas state courts have made unreasoned distinctions that impede open and equal access to the courts. Robinson v. Beto, supra. It is clear from the above that the combined effect of certain state statutes, the action of

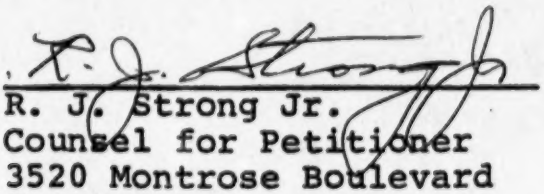
state officials in closing the Harris County Civil Courts Building, the failure of the Harris County Switchboard Operator to give vital information and the unreasonable procedure of the Harris County District Clerk to file motions on Christmas Eve 1979, have all caused the failure of petitioner to file his motion for new trial on December 24, 1979, which resulted in prejudice to petitioner in denying his right to appeal on grounds that in all probability would have necessitated a reversal and remand

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgement of the Supreme Court of Texas in Muhammad F. Malik v. Hidden Valley Civic Club and George A. Turner. In the event that the petition is granted, petitioner prays that the judgement of the Court below be reversed, that the cause be remanded, and that the Court below be

directed to issue the Writ of Error as prayed for in the petition.

Respectfully submitted,



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APPENDIX A

CLERK, SUPREME COURT OF TEXAS
BOX 12248, CAPITOL STATION
AUSTIN, TEXAS 78711

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P.B. METER P.B. 970244

THIS SIDE OF CARD IS FOR ADDRESS

R. J. STRONG, JR., Attorney
3520 Montrose Blvd., Suite 211
Houston, Texas 77006

CLERK'S OFFICE - SUPREME COURT

Austin, Texas September 10, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-9475, MUHAMMAD F. MALIK v. HIDDEN VALLEY CIVIC CLUB ET AL

was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX B

COPY OF JUDGMENT

MUHAMMAD F. MALIK

NO. 17694 VS. Appeal from District Court of Harris County. (Tr. Ct. #79 20713) Opinion delivered by Chief Justice Coleman, Justices Wallace and Doyle sitting.

HIDDEN VALLEY CIVIC CLUB ET AL

This cause, being an appeal from the judgment rendered and entered by the court below on December 13, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that the appeal bond was not timely filed in accordance with the provisions of Rule 356, T.R.C.P. it is therefore considered, adjudged and ordered that the appeal herein be, and the same hereby is, dismissed for want of jurisdiction.

It is further ordered that the appellant, Muhammad F. Malik, and his surety, Lawyers Surety Corporation, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Coleman and Justices Wallace and Doyle.

....

Appeal Dismissed for w.o.j. and opinion filed April 10, 1980.

MUHAMMAD F. MALIK, APPELLANT

No. 17694 VS.

HIDDEN VALLEY CIVIC CLUB & GEORGE TURNER, APPELLEES

- - - - - - - - - - - - - - - - - -

Appeal from the District Court of Harris County, Texas,

125th Judicial District

- - - - - - - - - - - - - - - - - -

George A. Turner, plaintiff in the trial court, has brought to the attention of this court his contention that Muhammad F. Malik, defendant in the trial court, has failed to perfect his appeal to this court by reason of the fact that he failed to file a cost bond within 30 days from the date of the entry of judgment by the trial court. Malik contends that December 24, 1979, was a legal holiday and that by reason of this fact his filing of his motion for new trial on December 26, 1979, was timely. If the motion for new trial was filed within 10 days of the date the judgment was signed, the cost bond was filed in a timely manner and this court has acquired jurisdiction of the appeal.

We conclude that this court lacks jurisdiction to entertain the appeal.

Plaintiff's motion for new trial was not filed within 10 days from the date on which the judgment was signed. The judgment was signed on the 13th day of December, 1979. Rule 4, T.R.C.P., provides that the day of the act or event after which the designated period of time begins to run is not to be included. The 10 day period for the filing of the motion for new trial therefore would end on December 24, 1979, unless it is a legal holiday. The legal holidays in the State of Texas are enumerated in Article 4591, V.A.C.S. December 24, is not listed as a legal holiday in that Article. Malik relies on the holding of the Supreme Court in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex.1979) in which the court determined

that January 2, 1978 was a legal holiday for procedural purposes within the meaning of Rule 4 of Tex.R.Civ.P. The Supreme Court pointed out that "the Legislature in 1977 Tex.Gen.Laws, chapter 872, at page 3145 specifically declared Monday, January 2, 1978, to be a "holiday" for State employees." The court pointed out that the numbers and dates of State holidays are directly related to the appropriation of funds for hours and days of work by State personnel from the State treasury. The Act of the Legislature cited was the Appropriation Bill for the biennium 1978-1979.

The Appropriations Act effective on December 24, 1979, is found in General and Special Laws of Texas, vol. 2, chapter 843. Paragraph 3 of Section 6, Chapter 843, supra, at 2900, provides that holidays for State employees shall be those specified in Article 4591, V.A.C.S. Chapter 843, Section 7, paragraph b, supra, at 2901, provides:

> "Employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on Friday immediately following the 4th Thursday in November, and December 24 and December 26."

It is apparent that the Appropriations Act does not constitute December 24, 1979, a legal holiday.

The motion for new trial was not timely filed. In such a case the time for filing of an appeal bond begins on the date the judgment is signed. The tardy filing for a motion for new trial does not operate to extend the time for filing the appeal bond even though the late motion be considered and overruled by the trial judge. Metal Enterprises, Inc. v. Don Love, Inc., 559 S.W.2d 90 (Tex.Civ.App.--Houston [1st Dist.] 1977, no writ).

A cost bond was filed in this case on February 26, 1980. It was not filed within 30 days from the date the judgment was signed.

This court cannot acquire jurisdiction of an appeal where an appeal bond has not been timely filed; Metal Enterprises, Inc. v. Don Love, Inc., supra; Washington v. Golden State Mutual Life Insurance Company, 408 S.W.2d 227 (Tex.1966).

The appeal is dismissed.

/s/ Tom F. Coleman
Chief Justice

Panel consists of Coleman, Chief Justice, Wallace and Doyle, Justices.

Judgment rendered and opinion filed April 10, 1980.

APPENDIX C

R. 683

NO. 79-20,713

HIDDEN VALLEY CIVIC CLUB AND GEORGE A. TURNER	*	IN THE DISTRICT COURT OF
VS.	*	HARRIS COUNTY, TEXAS
MUHAMMAD F. MALIK	*	125TH JUDICIAL DISTRICT

ORDER OF PERMANENT INJUNCTION

On the 15th day of October, 1979, came on to be heard in the above styled and numbered cause Plaintiffs' application for a permanent injunction and reasonable attorney's fees against the Defendant, MUHAMMAD F. MALIK, and then came Plaintiffs HIDDEN VALLEY CIVIC CLUB and GEORGE A. TURNER and announced ready for trial, and then came the Defendant, MUHAMMAD F. MALIK, and announced ready for trial.

Thereupon, a jury having been demanded by the Defendant, a jury was called, tested, selected and duly empaneled and sworn, and on October 16, 1979, the case proceeded to trial with the reading of the pleadings and opening remarks, and continued with the introduction of evidence until October 17, 1979, at which time the evidence on behalf of Plaintiffs and Defendant having been concluded, the Court over-ruled Defendant's motion for instructed verdict, and the parties having rested their respective cases, the Court prepared the charge of the Court, and both parties were give the opportunity to make their objections and exceptions thereto, and to submit their own charge or special issues.

Whereupon, after the Court having dismissed HIDDEN VALLEY CIVIC CLUB as a Plaintiff and having granted a take nothing judgment with respect to Plaintiffs' request for an order enjoining the Defendant from using the property made a basis of this suit as a dwelling for more than a single family, and from parking or permitting the parking of any automobile or truck not in daily use whether on his said lot or lots or on the street adjacent thereto for more than one week unless stored in a closed garage, the jury was seated and charged by the Court, and counsel for Plaintiff GEORGE A. TURNER and counsel for Defendant presented their arguments, and the case was duly sent to the jury; and the jury having duly returned and deliberated, reached a

a 10 to 2 verdict and returned same unto the Court, as provided by law, at 12:30 p.m. on October 18, 1979. Upon Plaintiff's motion, such verdict was received by the Court and ordered filed among the papers of this cause, and the jury was discharged.

Special Issues submitted to the jury and the jury's answers thereto were as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the security light or lights erected by Defendant Muhammad F. Malik on his lot is a "utility structure" within the meaning of the Hidden Valley Section 8 subdivision restrictions?

Answer "We do" or "We do not"

ANSWER: "WE DO"

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the erection of the security light or lights by Defendant Muhammad F. Malik on his lot is a substantial violation of the Hidden Valley Section 8 subdivsion restrictions?

Answer "We do" or "We do not"

ANSWER: "WE DO"

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the Defendant, Muhammad F. Malik (a) installed both mercury security lights in question and (b) that both mercury security lights are located on Defendant Muhammad F. Malik's lot?

Answer "We do" or "We do not" separately in the spaces provided in (a) and (b) below.

	We Do	We do not
ANSWER: (a) Malik installed both lights	"WE DO"	
(b) Both lights located on Malik's lot	"WE DO"	

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that there was an unreasonable delay which has worked injury to Defendant Muhammad F. Malik on the bringing of this suit by Plaintiff Turner from the time the Plaintiff Turner knew or should have known that Defendant Muhammad F. Malik was installing or had installed a mercury security light?

Answer "We do" or "We do not"

ANSWER: "WE DO NOT"

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that prior to the installation of a security light by Defendant Muhammad F. Malik there were other similar security lights located in other yards of other lots in Section 8 of Hidden Valley?

Answer "We do" or "We do not" in the space provided in Column 1 below.

If you have answered "We do" in Column 1 below, then do you find from a preponderance of the evidence that such similar security lights

were a substantial violation of the restrictions of Section 8 of Hidden Valley?

Answer "We do" or "We do not" in the space provided in Column 2.

ANSWER:	Column 1 Other similar security lights	Column 2 Substantial violation
	"WE DO"	"WE DO NOT"

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that (a) light poles installed by the builder in the front yards of lots in Section 8 of Hidden Valley and (b) Basketball backboard goals installed on lots in Section 8 of Hidden Valley are "Utility structures" within the meaning of the Hidden Valley Section 8 restrictions?

Answer separately "We do" or "We do not" in Column 1 provided in (a) and (b) below.

If you have answered "We do" in Column 1 then from a preponderance of the evidence do you find that such utility structures, if any, were substantial violations of the Hidden Valley Section 8 restrictions?

Answer "We do" or "We do not" in the space provided in Column 2 below for (a) and (b).

ANSWER:	Column 1 Utility structures	Column 2 Substantial violation
(a) light poles installed by builder	"WE DO NOT"	_____
(b) basketball backboard goal	" WE DO NOT"	_____

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that the Plaintiff Turner acquiesced or consented to construction and/or maintenance and/or location of (a) light poles installed by the builder in the front yards of lots in Section 8 of Hidden Valley (b) basketball backboard goals on the lots of Section 8 in Hidden Valley (c) other similar security lights on lots other than Defendant Muhammad F. Malik in Section 8 of Hidden Valley.

Answer separately "We do" or "We do not" in Column 1 for (a) (b) and (c) below.

ANSWER:	Column 1 Acquiesced or consented
(a) light poles installed by builder	"WE DO"
(b) basketball goals	"WE DO"
(c) other similar security lights in Section 8	"WE DO"

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that such acquiescense or consent by Plaintiff Turner of (a) (b) or (c) below constituted a waiver of Plaintiff Turner's right to bring this suit seeking removal of the security light installed by Defendant Malik?

By the term "waiver" is meant an intentional relinquishment of a known right, benefit or advantage which the party relinquishing would otherwise have enjoyed.

Answer separately "We do" or "We do not" in (a) (b) and (c) below.

ANSWER:

	Column 1 Waiver
(a) light poles installed by builder	"WE DO NOT"
(b) basketball goals in Section 8	"WE DO NOT"
(c) other similar security lights in Section 8	"WE DO NOT"

SPECIAL ISSUE NO. 9

What do you find from a preponderance of the evidence to be a reasonable attorney's fee to be fixed for attorney Gaylen Nix for the prosecution of this case?

Answer in dollars and cents, if any.

ANSWER: "$2,000.00"

The Plaintiff having filed his motion for judgment on the findings of the jury, and the Defendant having filed his motion for judgment non obstante verdicto, the Court finds that the evidence is insufficient to support a finding that both of the two (2) mercury security lights made a basis of this suit were installed upon Defendant's premises in Section 8 of Hidden Valley. Further it appearing to the Court from the verdict of the jury and the law applicable thereto and the admissions of the Defendant that the Plaintiff, GEORGE A. TURNER, is entitled to a mandatory permanent injunction and reasonable attorney's fees, as herein granted, same being within the pleadings, admissions, evidence, prayer and the verdict, for the reason that Defendant has violated deed restriction 11 as set forth in an instrument recorded in the Deed Records of Harris County, Texas, at County Clerk's File No. E073348, et. seq., as amended by an instrument recorded in the Deed Records of Harris County, Texas, at County Clerk's File No. E266621, et. seq., by installing or permitting the installation of a utility structure, to-wit: a mercury security light with pole upon his premises located at Lot 1159, Block 52, of Hidden Valley, Section Eight (8), a subdivision in Harris County, Texas, as shown by the corrected plat thereof recorded at Volume 216, Page 118, of the Map Records of Harris County, Texas, nearer to Bertrand Street than the rear corner of his house located upon said lot; and by further reason that the Plaintiff has no adequate remedy at law to prevent the foregoing act and has no clear, complete, and adequate remedy at law, and that the Plaintiff will suffer irreparable harm and damage to vested property rights unless this mandatory injunction be granted; and the Court finds each and every fact

necessary to support the injunction, including a finding with respect to jurisdiction and venue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, MUHAMMAD F. MALIK, remove within forty-five (45) days of the date of the signing of this Order by the Court the utility structure, to-wit: a mercury security light, complete with pole and other aboveground appurtenances, heretofore installed upon Lot 1159, Block 52, of Hidden Valley, Section Eight (8), a subdivision in Harris County, Texas, according to the corrected map thereof recorded at Volume 216, Page 118, of the Map Records of Harris County, Texas, nearer to Bertrand Street than the rear corner of the house located upon said Lot 1159.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, MUHAMMAD F. MALIK, his spouse, agents, servants, employees, and ~~attorneys~~, and any other person in active concert or participation with him who receive actual notice hereof by personal service or otherwise, be and are hereby permanently enjoined from installing or permitting the installation upon Lot 1159, Block 52, of Hidden Valley, Section Eight (8), a subdivision in Harris County, Texas, as shown by the corrected plat thereof recorded at Volume 216, Page 118, of the Map Records of Harris County, Texas, a security light or lights or any other utility structure nearer to Bertrand Street than the rear corner of the house located upon said Lot 1159.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Clerk of this Court issue a Writ of Permanent Injunction; said Writ to be accompanied by a true and correct copy of this Order.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that HIDDEN VALLEY CIVIC CLUB, its officers and agents, as principal, and Lawyers Surety Corporation, as surety, be and are hereby discharged on the Bond of Temporary Injunction heretofore filed in this cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, GEORGE A. TURNER, be and is hereby awarded a judgment in the amount of TWO THOUSAND AND NO/100 DOLLARS ($2,000.00) plus interest from the date hereof at the legal rate of 9.0%, for reasonable attorney's fees. The judgment is hereby awarded against Defendant MUHAMMAD F. MALIK, for which let execution issue if not timely paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs take nothing with respect to their request for an order enjoining the Defendant from using the property made a basis of this suit as a dwelling for more than a single family, and from parking or permitting the parking of an automobile not in daily use whether upon said lot or lots or on the street adjacent thereto for more than one week unless stored in a closed garage.

All relief not expressly granted herein is hereby denied.

All costs of court in this behalf are hereby taxed against the Defendant, for which let execution issue if not timely paid.

To which Order and Judgment of the Court the Defendant here and now excepted and gave his notice of his intention to appeal same to one of the Courts of Civil Appeal sitting in Houston, Texas.

SIGNED AND RENDERED on this _____ day of _____, 1979.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
Clyde L. Nix
Attorney for Plaintiff
218 West Little York Road
Houston, Texas 77076
697-4871
State Bar No. 15040000

_____
R. J. Strong, Jr.
Attorney for Defendant
3520 Montrose, Suite 211
Houston, Texas 77006
529-4868
State Bar No. 194-17600

APPENDIX D

AFFIDAVIT

STATE OF TEXAS:

COUNTY OF HARRIS:

BEFORE ME, the undersigned authority, on this day personally appeared RAY HARDY, District Clerk of Harris County, Texas, who being by me here and now duly sworn stated to me upon his oath as follows, to-wit:

"I am RAY HARDY, District Clerk of Harris County, Texas, and was likewise employed on December 24, 1979. I have never been convicted of a felony or a misdemeanor involving moral turpitude. I am over the age of 21 and fully competent to make this affidavit. I have personal knowledge of each and every fact contained herein.

"I am the duly elected District Clerk of Harris County, Texas and Clerk of the 125th District Court. My office for filing papers, motions, pleadings and other similar instruments is located in the Harris County Civil Courts Building.

"On December 24, 1979, my Civil Division Office on the 4th Floor of the Harris County Civil Courts Building was closed due to the day being Christmas Eve and a Harris County holiday. One seeking to file a Motion for New Trial in Cause No. 79-20713, HIDDEN VALLEY CIVIC CLUB and GEORGE TURNER VS. MUHAMMAD F. MALIK, in the 125th District Court would not have been able to file the same at the Civil Division of the District Clerk's Office on that date. The Harris County Civil Courts Building where the Civil Division of the District Clerk's Office is located was closed. There were no notices left on the door of said building indicating where such motions could be filed. However, the County Switchboard Operators have names of the District Clerk deputies who may be called in case of emergencies. One of the deputies on duty December 24, 1979 for this purpose was Thomas L. Love, Assistant Chief Deputy, to whom the County Operator would refer any emergency call relative to filings in the Civil Division of the District Clerk's Office. Mr. Love would review the particular emergency and in the event of a filing deadline, Persons are told they may file any such instruments seven (7) days a week, twenty-four hours a day at the District Clerk's Central bonding Office on the 3rd Floor of the Criminal Courts Building or may take said filing to the residence of Mr. Love if so desired.

Ray Hardy

RAY HARDY, DISTRICT CLERK
HARRIS COUNTY, T E X A S

SWORN AND SUBSCRIBED TO before me on this 18th day of April, 1980, by the said RAY HARDY, DISTRICT CLERK, to certify which witness my hand and seal of office.

Sylvia L Diaz

NOTARY PUBLIC in and for
HARRIS COUNTY, T E X A S

My Commission expires:

10-23-80

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HIDDEN VALLEY CIVIC CLUB and GEORGE A. TURNER	X	
VS.	X	CIVIL ACTION NO._____
MUHAMMAD F. MALIK	X	

PETITION FOR REMOVAL OF CIVIL ACTION

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION:

Petitioner, MUHAMMAD F. MALIK, by his undersigned attorney, respectfully shows the court:

1. Petitioner is the defendant in the above entitled action.

2. On March 10, 1980, the above entitled action was commenced against petitioner in the 125th Judicial District Court of Harris County, Texas, and is now pending therein.

3. On April 5, 1980, a deputy of C.R. Davis, Constable Precinct 4, Harris County, Texas, left a copy of the original pleading here complained of with petitioner's brother who was at petitioner's house at the time at 927 Bertrand, Houston, Harris County, Texas.

4. No further proceedings have been had herein in the 125th District Court of Harris County, Texas.

5. Plaintiff Turner is a citizen and resident of the State of Texas, and defendant is a citizen and resident of the State of Texas.

6. The above-entitled civil action against petitioner in the 125th District Court of Harris County, Texas, may be removed to this Court pursuant to 28U.S.C. Section 1443(1) on the ground that petitioner is and has been denied by such state court proceeding his rights secured and guaranteed to him by the laws providing for equal civil rights of citizens of the United States, specifically 42 U.S.C. Sections 1981, 1983, 2000a et seq. Such denial has occurred and continues to occur in that petitioner, of Pakistani origin and of the Muslim faith, is in the process of appealing a judgement entered against him on December 13, 1980. Pursuant to Rule 329b of the Texas Rules of Civil

procedure, petitioner was given ten (10) days thereafter to file a motion for new trial. Under Rule 4 the said ten (10) day period therefore end on Monday, December 24, 1979, unless for state procedural purposes, December 24, was not to be counted. In any event, pursuant to Paragraph B, Section 7, Article 9, HB558, found in the General and Special Laws of Texas, Vol. 2, Chapter 843 at 2901, the state legislature provided that state employees shall be entitled to vacation or leave time on December 24, 1979. In addition, the state legislature has provided in Article 2372h-1, Vernon's Revised Civil Statutes that each elected county officer or the Commissioner's court shall have authority to provide for vacations and holidays fixed by state law without deduction or loss of pay. It is an established fact that on December 24, 1979, the office of the District Clerk of Harris County, Texas, where the motion for new trial is to be filed, was closed due to the authority of the state legislature in the above cited legislation. Believing that he had timely filed his motion for new trial, petitioner filed his cost bond on appeal on February 26, 1980, within the thirty (30) day period under Rule 356 TRCP. Petitioner's motion for new trial was overruled on January 28, 1980, by the trial court. Shortly thereafter, petitioner caused to be placed with the clerk of the Court of Civil Appeals for the 1st Supreme Judicial District the transcript and statement of facts on March 11, 1980, and March 18, 1980, respectively, after the said Court of Civil Appeals on March 6 had granted petitioner until March 28, 1980, to file said records.

However, on or about March 10, 1980, respondent caused to be filed in the trial court his motion for contempt. This motion is being prosecuted in bad faith to deny petitioner his right of appeal under both the due process and equal protection clauses of the state and federal constitutions. Respondent's motion for contempt is being brought also in the name of the Hidden Valley Civic Club, although the trial court found they had no standing to sue as a party plaintiff. Respondent seeks to cut short petitioner's constitutional right of appeal by having

/the trial court enforce a mandatory injunction against petitioner, making any appeal on the merits moot. Of course the danger here is that respondent hopes to pressure the trial judge into holding petitioner in contempt by crowding the courtroom with irate voting citizens who will be upset if the Pakistani Muslim petitioner is not incarcerated and ordered to perform an act that will render his appellate remedies moot.

On April 10, 1980, the said Court of Civil Appeals ordered that the record on appeal be filed and held that December 24, 1980, did not toll the ten (10) day motion for new trial period and that said court did not have jurisdiction. Petitioner filed his motion for rehearing on April 10, 1980, to perfect his right to petition to the Texas Supreme Court by way of writ of error.

7. This Court has original jurisdiction of the above entitled action pursuant to 28 U.S.C. Section 1343(1) and (3), and the action may therefore be removed to this Court pursuant to 28 U.S.C. Section 1443.

8. Pursuant to 28 U.S.C. Section 1446(d), petitioner presents and files herewith a bond, with good and sufficient surety conditioned that petitioner will pay all costs and disbursement incurred by reason of the removal proceedings herein sought should it be determined that the above entitled action is not removable or that it was improperly removed.

10. A copy of the motion for contempt served on petitioner in the above entitled action is attached hereto.

11. This Petition is filed with this Court within thirty (30) days after service on petitioner of the said motion for contempt in the above entitled action.

WHEREFORE, petitioner prays that the above entitled action be removed from the 125th District Court to this Court.

Dated April 10, 1980.

R. J. Strong Jr.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
(713/529-4868

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1st SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALI,

Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER

Appellees

MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

Muhammad F. Malik, Appellant in the above entitled and numbered cause, respectfully moves the court to set aside the judgement of this court entered on April 11, 1980, wherein this court ruled it did not have jurisdiction to hear this case on appeal and that such appeal was not properly perfected. As grounds for this motion Appellant shows the following:

I.

The Court of Civil Appeals erred in denying Appellant his right to appeal and in holding that it did not have jurisdiction to hear the appeal on the merits.

Appellant relied on the legislature's notice embodied in Rule 329b(1.) of the Texas Rules of Civil Procedure that Appellant's motion for new trial, could be filed within ten (10) days after judgement or other order complained of is rendered, and the same state legislature's declaration in Paragraph B, Section 7, Article 2372h-1, Vernon's Revised Civil Statutes, that provides that state employees were not required to work on December 24, 1979 and that the County Commissioner had authority from the said legislature to declare December 24, 1979, a day that state employees would not have to work.

II.

On December 24, 1979, state employees in Harris County did not work, and consequently, it was a legal impossibility to file a motion for new trial or any other motion or pleading that day due to the Ray Hardy's office being closed. The legislature in effect, has determined December 24, 1979, to be a "holiday for procedural purposes." See Mid Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (July 25, 1979). To conclude otherwise would be an absurdity and contrary to all principles of due process and equal protection under the state and federal constitutions.

WHEREFORE, Appellant respectfully requests that this motion be granted, that Appellant not be denied his right to appeal and that the judgment of the trial court be reversed.

Dated April 11, 1980.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
713/529-4868

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument and being first duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 11th day of April, 1980.

My Commission Expires:
[illegible]

Notary Public in and for
Harris County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been mailed this _____ day of _____, 1980 to opposing counsel, Gaylon Nix, Esq., 218 Little York, Houston, Texas.

R. J. Strong Jr.

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALIK,
Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER
Appellees

AMENDED MOTION FOR REHEARING

Muhammad F. Malik, Appellant in the above entitled and numbered cause, respectfully moves the court to set aside the judgement of this court entered on April 10, 1980, wherein this court ruled it did not have jurisdiction to hear this case on appeal and that such appeal was not properly perfected. As grounds for this motion Appellant shows the following:

I.

The Court of Civil Appeals erred in denying Appellant his right to appeal and in holding that it did not have jurisdiction to hear the appeal on the merits.

Appellant relied on the state legislature's notice embodied in Rule 329b(1.) of the Texas Rules of Civil Procedure that Appellant's motion for new trial could be filed within ten (10) days after judgement or other order complained of is rendered, and the same state legislature's declaration in Paragraph B, Section 7, Article 9, 6558 and Article 2372h-1, Vernon's Revised Civil Statutes, that provides that state employees were not required to work on December 24, 1979 and that the County Commissioner had authority from the said legislature to declare December 24, 1979, a day that state employees would not have to work.

II.

On December 24, 1979, state employees in Harris County did not work, and consequently, it was a legal impossibility to file a motion for new trial or any other motion or pleading that day due to the Ray Hardy's office being closed. The legislature in effect, has determined December 24, 1979, to be a "holiday for procedural pruposes." See Mid Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (July 25, 1979).

To conclude otherwise would be an absurdity and contrary to all principles of due process and equal protection under the state and federal constitutions.

WHEREFORE, Appellant respectfully requests that this motion be granted, that Appellant not be denied his right to appeal and that the judgement of the trial court be reversed.

Dated April 11, 1980.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
713/529/4868.

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing and being duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 1980.

Notary Public in and for
Harris County, Texas

My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Motion For Rehearing has been mailed to opposing counsel, Gaylen Nix, 218 W. Little York, Houston, Texas, this 11-11 day of _____, 1980.

R. J. Strong Jr.

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALIK
Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER
Appellees

SUPPLEMENTAL MOTION
FOR REHEARING

Muhammad F. Malik, Appellant, respectfully moves the court to set aside the judgment of this court entered on April 10, 1980, wherein this court ruled it did not have jurisdiction to hear this cause since this appeal was not properly perfected.

I.

The Court of Civil Appeals erred in denying Appellant his right to appeal and in holding that it did not have jurisdiction to hear the appeal on the merits.

Rule 329b(1) of the Texas Rules of Civil Procedure grants applicants ten (10) days to file a motion for new trial after judgment is rendered. Yet, this court by its ruling on April 10, 1980, has determined that Appellant Muhammad F. Malik did not have ten (10) days to file his motion for new trial, but rather only seven (7) days to file the same in order to extend the time for filing a cost bond. This is violative of due process and equal protection of the laws under both the state and federal constitutions. The state legislature has expressly granted applicants ten (10) days to file motions for new trial. Since the Civil Division Office of the Harris County District Clerk was closed on December 24, 1979 (see attached copy of statement), it was impossible under constitutional standards for the undersigned attorney to file such a motion on that date. Faced with the option of either tolling the time for which such motion could be filed in order to preserve Appellant's right to appeal

his case or shortening the time to less than ten (10) days, since December 22 and 23 were a Saturday and Sunday, respectively, and said District Clerk's office was also closed, this court has opted to interpret Rule 329b to read in the instant case that said motion for new trial "shall be filed within seven (7) days after the judgement" is rendered. In other words, without any notice to Appellant before he relied on Rule 329b's ten (10) day period, this court has determined the rule to require less than ten (10) days. This court's ruling of April 10, 1980 was therefore unconstitutional.

II.

It appears that this court in strictly construing Article 4591, V.A.C.S. in not including December 24, 1979, as a legal holiday, or apart from said statute, that December 24, 1979, would not toll the period for appeal in the instant case, it has thereby made Rule 329b unconstitutionally vague and unclear as to the legislative intent in establishing said rule.

It seems clear enough to the undersigned attorney that the state legislature did not intend for Rule 329b to be read in such a vague manner since ten (10) days was expressly granted applicants. At the same time it is apparent enough that a "holiday for procedural purposes" may include some days that are not listed under Article 4591. For instance Christmas Eve, although not a "legal holiday", may or may not be considered a "holiday for procedural purposes". That is, December 24 of any one year may or may not take on the qualities and characteristics of a "holiday for procedural purposes", it depends solely on the state's treatment of that day. The state legislator declared in Paragraph B, Section 7, Article 9, HB558 found in General and Special Laws of Texas, vol. 2, chapter 843 that state employees shall be entitled to, in addition to leave, vacation or leave time, and without deduction in in pay, December 24, 1979. December 24, 1979, was a Harris County holiday. On December 24, 1979, the Civil Division of the Harris County District Clerk's office, where motion for new trials in civil cases are filed was closed. The undersigned attorney was unable to file said motion for new trial on December 24, 1979, although he attempted to so file on that date. Yet, this court has determined in effect that,

in spite of the above, the motion for new trial should have either been filed on December 24, 1979, the tenth day after judgement when it was impossible for said attorney to do so, or within seven (7) days from said judgement. There was no notice embodied in either statute or case law to notify the undersigned attorney of the manner in which this court has interpreted the above laws. Although Rule 329b is on its face clear as to the ten (10) day period, this court has interpreted said statute in a way as to deprive Appellant of his right to appeal, and as such, has interpreted said statute in an unconstitutional manner and violative of the due process and equal protection clauses embodied in the state and federal constitutions.

Dated April 24, 1980.

R. J. Strong Jr.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
713/529-4969

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument and being first duly sworn, acknowledges that he signed the same for the purposes and consideration for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 24th day of April, 1980.

Notary Public in and for
Harris County, Texas

My commission expires

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Motion for Rehearing has been mailed to Mr. Gaylen Nix, 218 West Little York, Houston, Texas on this 25th day of April, 1980.

R. J. Strong Jr.
R. J. Strong Jr.

NO. _____

IN THE

SUPREME COURT OF TEXAS

MUHAMMAD F. MALIK
Petitioner

VS.

HIDDEN VALLEY CIVIC CLUB and
GEORGE A. TURNER
Respondents

R. J. STRONG JR.
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STATEMENT OF THE CASE

This cause being an appeal from the judgement rendered and entered by the trial court below, was dismissed by the Court of Civil Appeals for the 1st Supreme District of Houston because it is the opinion of the Court of Civil Appeals that the appeal bond was not timely filed in accordance with provisions of Rule 356, T.R.C.P. The opinion of the Court of Civil Appeals, however, failed to take into consideration the timely filing of Petitioner's Motion for New Trial.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Tex. Rev. Civ. Stat. Ann. art. 1728, subdivisions 2, 3 and 6.

POINTS OF ERROR

I. Point of Error No. 1

The denial of Petitioners right to appeal was a deprivation of his rights under the Fourteenth Amendment to the United States Constitution.

II. Point of Error No. 2

The Court of Civil Appeals erred in dismissing Petitioner's appeal for want of jurisdiction.

NO. _____

IN THE
SUPREME COURT OF TEXAS

MUHAMMAD F. MALIK
Petitioner

VS.

HIDDEN VALLEY CIVIC CLUB AND
GEORGE A. TURNER
Respondents

APPLICATION FOR WRIT OF ERROR

To The Supreme Court of Texas:

Muhammad F. Malik, Petitioner, respectfully presents this Application for writ of Error to the Court of Civil Appeals for the 1st Supreme Judicial District of Texas, Houston, to review and correct the errors of law committed by said Court of Civil Appeals in Cause No. 17694 on the docket of said court entitled Muhammad F. Malik, appellant v. Hidden Valley Civic Club and George A. Turner, appellees, motion for rehearing having been overruled on April 24, 1980, and supplemental motion for rehearing haveing been overruled on May 8, 1980.

POINT OF ERROR NO. 1

The denial of Petitioners right to appeal was a deprivation of his rights under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE LAW

It is a well established principle of the law that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. Lindsey v. Norman, 92 S.Ct. 862, 405 U.S. 56 (1972). However, where a state provides appellate review, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without

violating the Equal Protection Clause. I.B.I.D. Moreover, due process requires that state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. Robinson v. Beto, 426 F2d. 797 (5th Cir. 1970). "Equal protection of the law" implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination. Republic Pictures Corp. V. Kappler, 151 F.2d 543 (8th Cir. 1945) 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L. Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L. Ed. 1040. See also Swick v. Glenn L. Martin Co., 68 F.Supp. 863, (D.C. Md. 1947), affirmed 160 F.2d 483, certiorari denied 68 S.Ct. 85, 332 U.S. 772.

STATEMENT OF FACTS

On December 13, 1979, judgement was rendered in the 125th District Court of Harris County, Texas. Under the ten (10) day rule embodied in Rule 329b(1), of the Texas Rules of Civil Procedure, the last day to timely file a motion for new trial was on December 24, 1979, unless it was considered a holiday for procedural purposes. On the morning of December 24, 1979, Petitioner's attorney, R. J. Strong Jr., a black man, telephoned the Harris County switchboard operator, a white woman, regarding the Harris County District Clerk's office and was informed by the said operator that the said office was closed due to that day being a holiday. In the early afternoon of the same day, said attorney proceeded to the Harris County Civil Court Building where motions for new trial in civil cases are filed. However, having arrived at said courthouse, said attorney discovered the doors of the building were locked and a sign on the door informed him that due to December 24, 1979,

being a holiday, it was closed. There were no signs or notices directing said attorney to a place, if any, where such motions could be filed. (See affidavit of Ray Hardy attached hereto and made a part hereof). During the four and a half (4-1/2) years said attorney has practiced law in Harris County, including three (3) years with the state attorney general's office, said attorney has never known or heard of a place other than the Fourth Floor of the Harris County Civil Courts Building where the Harris County Clerk's Civil Division Office is located where such motions may be filed in the District Courts of Harris County, Texas.

On the other hand, the Affidavit of Ray Hardy, attached hereto, indicates that some attorneys could have filed a motion for new trial on December 24, 1979. Conceivably, there were two (2) classes of attorneys who could have filed a motion for new trial on the day in question: (1) those who know Ray Hardy or Tom Love personally and their telephone numbers and feel free to call these gentlemen regarding the filing of such motions when the Civil Division Office is closed on holidays; or (2) those who call the Harris County Switchboard Operator and receive the telephone number of Tom Love or other District Clerk deputy. Of course, this all assumes that the filing would be classified by that deputy as "an emergency," for if the said dep y determined December 24, 1979, was a holiday for procedural purposes or otherwise thought the filing date would be extended, the filing presumably would not be permitted.

Attorney for Petitioner, R. J. Strong Jr., did not personally know either Ray Hardy or Tom Love on December 24, 1979. Neither did

Petitioner's attorney know the telephone number of Ray Hardy or Tom Love on December 24, 1979, or even up to this writing. Even if Petitioner's attorney knew the telephone numbers of the said clerk or his deputies, without knowing he was entitled to call these persons on Christmas Eve regarding filing a motion for new trial, out of common, human courtesy, he would not have felt free to call any of said persons regarding making special provisions for him to file a motion for new trial that day. Nor would said attorney have had any reasonable expectations that said clerk or deputies would make arrangements for filing the same on Christmas Eve, their holiday from work.

Although Petitioner's attorney called the Harris County Switchboard Operator and inquired about the filing of a motion for new trial, said operator did not give him any information regarding the same. Thus, said attorney had no way of knowing that the motion could be filed that day although, presumably, some other attorneys could or may have filed similar motions that day due to their fitting into one of the two (2) above mentioned classifications.

Petitioner avers that said classifications are capricious and arbitrary and a violation of the Equal Protection Clause. Lindsey v. Norman, supra. Petitioner further alleges that said classifications make unreasoned distinctions that impede open and equal access to the courts. Robinson v. Beto, supra. Thus, all litigants similarly situated on December 24, 1979, could not have filed a motion for new trial and extended the period for filing the appeal bond due to the discriminatory effects of said classifications. Republic Pictures Corp. v. Kappler and Swick v. Glenn L. Martin Co., both supra.

Therefore, the Court of Civil Appeals dismissal of this appeal capriciously and arbitrarily deprived Petitioner of his right to appeal and makes unreasoned distinctions for Petitioner that have impeded open and equal access to the courts to him all in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

POINT OF ERROR NO. 2

The court of Civil Appeals erred in dismissing Petitioner's appeal for want of jurisdiction.

STATEMENT OF LAW

Rule 329b(1) of the Texas Rules of Civil Procedure grants applicants ten (10) days to file a motion for new trial after judgment has been rendered. However, the filing of such a motion for new trial after ten (10) days have expired and before thirty (30) days have expired since the rendition of the judgment shall not operate to extend the court's jurisdiction over the judgment for a period of more than thirty (30) days from the date of the rendition of judgment Rule 329b(5). Under Rule 4 T.R.C.P, in computing any period of time prescribed or allowed by the Texas Rules of Civil Procedure, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included, and the last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday. Legal holidays in the State of Texas are enumerated in Article 4591, V.A.C.S. However, in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex. Spr. Crt. 1979), the Supreme Court of Texas held that Monday, January 2, 1978, was a "legal holiday for procedural purposes" within the meaning of Rule 4, T.R.C.P. even though said January 2, 1978, was not listed as a legal holiday under Article 4591. The Supreme Court ultimately based its holding in Mid-Continent on the fact that the number and date of state holidays

are directly related to the appropriation of funds for hours and days of work by state personnel from the State Treasury.

Article 2372h-1 provides, inter alia, that in each county of Texas, each elected county officer or the Commissioner's Court, as the case may be, shall have authority to provide for holidays fixed by State law without deduction or loss of pay for the employees working under the elected county officer or his appointees regardless of whether the employee is paid on a fixed salary basis or on the basis of an hourly or daily wage. Additionally, the Appropriations Act effective at all relevant times stated herein and found in General and Special Laws of Texas, vol. 2, chapter 843. Paragraph 3 of Section 6, at 2900 provides that holidays for State employees shall be those specified in Article 4591, V.A.C.S. However, Section 7, paragraph b, supra at 2901, provides that employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on the Friday immediately following the fourth Thursday in November, and December 24 and December 26.

STATEMENT OF FACTS

On Thursday, December 13, 1979, the Honorable Charles R. Price, judge of the 125th District Court of Harris County, Texas, rendered judgement against Petitioner in trial Cause No. 79-20713, styled Hidden Valley Civic Club and George A. Turner, plaintiffs, vs. Muhammad F. Malik, defendant. On Monday, December 24, 1979, Petitioner's attorney, the undersigned, telephoned the Harris County Switchboard Operator regarding filing a motion for new trial and was informed that the Office of Ray Hardy, District Clerk of Harris County, was closed. The undersigned

attorney in an attempt to file a motion for new trial proceeded to the Harris County Civil Courts Building where the said District Clerk's Civil Division Office is located. Upon approaching the entrance of the Harris County Civil Courts Building, the undersigned attorney found the doors of the building locked and a sign on the door that said the building was closed due to December 24, 1979, being a holiday. (See copy of affidavit of the Honorable Ray Hardy labled "Exhibit A," attached hereto and incorporated by reference). On December 26, 1979, the first day the Civil Division Office was opened since the preceeding Friday, December 21, 1979, the undersigned filed Petitioner's motion for new trial. On January 28, 1980, Petitioner's motion for new trial was overruled, after hearing, before Judge Price.

On February 22, 1980, Petitioner filed his motion to extend time to file transcript and statement of facts until March 28, 1980. On February 26, 1980, Petitioner filed his appeal bond, and pursuant to request by the Clerk of the Court of Civil Appeals for the 1st Supreme Judicial District of Texas, Houston, the undersigned mailed a letter to said Clerk advising her of the date Petitioner's motion for new trial was filed. On March 3, 1980, Respondents opposition to the motion for extension of time to file transcript and statement of facts was filed alleging, inter alia, that Petitioner already had until March 28, 1980, to file the record on appeal under Rule 386, T.R.C.P. However, on March 5, 1980, Respondents filed their first amended opposition to Petitioners motion for extension of time to file the record on appeal alleging that the Court of Civil Appeals lacked appellate jurisdiction based on the allegation that Petitioner's motion for new trial was filed tardy.

On March 6, 1980, the said Court of Civil Appeals extended the time to file the transcript and statement of facts to and including March 28, 1980. On March 11, 1980, Petitioner delivered the transcript to said Clerk who refused to file the same, and on March 18, 1980, Petitioner delivered the statement of facts to said Clerk who refused to file the same. On or about March 14, 1980, Petitioner filed a supersedeas bond in the amount of $2000.00, and on March 19, 1980, filed an additional supersedeas bond pursuant to request by Respondent.

On April 10, 1980, Petitioner filed his motion for rehearing in the Court of Civil Appeals and on April 14, 1980, filed an amendment thereof. However, on April 24, 1980, the Court of Civil Appeals overruled Petitioner's motion for rehearing. On April 25, 1980, within fifteen (15) days of filing the motion for rehearing, Petitioner filed his supplemental motion for rehearing and Respondents filed their motion in support of overruling motion for rehearing; however, on May 8, 1980, the Court of Civil Appeals refused Petitioner's supplemental motion for rehearing.

ARGUMENT

In dismissing this appeal the Court of Civil Appeals incorrectly relies on Metal Enterprises, Inc. v. Don Love, Inc., 359 S.W.2d (Tex. Civ. App. - Houston [1st Dist.] 1977, no writ). In Metal Enterprises, the judgement of the trial court was rendered on Monday, May 9, 1977 and the motion to reinstate, which is treated as a motion for new trial for procedural purposes, was filed on Tuesday, May 24, 1977, some fifteen (15) days later. Under the ten (10) day rule embodied in Rule 329b(1). T.R.C.P., the said period ended on Thursday, May 19, 1977. There were no allegations

that the days between May 19, 1977, and May 24, 1977, in any way operated to extend the time for filing the motion in question nor that the plaintiff who filed said motion was unable to file the motion due to the distinct clerk's office being closed or otherwise prevented by some state action. In the instant case, the attorney for Petitioner attempted to file the motion for new trial on the tenth day of the ten (10) day period in question, but, through no fault of his own, was unable to do so because December 24, 1979, the end of the ten (10) day period, was a day that state employees did not work and was a day that the Harris County District Clerk's office where such motions are filed was closed to him. Thus, due to state legislative action, attorney for Petitioner was unable to file the motion for new trial on December 24, 1979. General and Special Laws of Texas, vol. 4, chapter 843 and Article 2372h-1, Vernon's Revised Civil Statutes.

Therefore, the Court of Civil Appeals' reliance on Metal Enterprises, Inc. was erroneous due to the substantial difference of facts in that case as compared to the instant appeal. In fact, in Seismic & Digital Concepts, Inc. v. Digital Resources Corporation, 583 S.W.2d 442 (Tex. Civ. App. - Houston [1st Dist.] 1979), the Court of Civil Appeals, opened the door in its reasoning used in that case. In Seismic & Digital Concepts, the Appellant sought an extension of time in which to file a statement of facts under the mandatory fifteen (15) day time limit of Rule 21c, T.R.C.P., the fifteenth day ending April 13, 1979, Good Friday. Apparently, as the Court of Civil Appeals held, the attorney for appellant in that case did not call the Court of Civil Appeals but instead relied on

information relayed to him on April 12, 1979, by the Harris County Switchboard operator that April 13, 1979, was a holiday and the courthouse would be closed. The Court of Appeals in that case held that Court personnel were present the entire day and that appellant failed to file the motion within the mandatory time limit. However, in the instant appeal, Petitioner's attorney was diligent and took every reasonable step to file the motion for new trial on December 24, 1979, a day that Court personnel were not present during any part of the day, a day that was a Harris County holiday and a day that the state legislature had declared to be a day that state employees did not have to work without deduction in pay. It is inconceivable that the Court of Civil Appeals would have included the above relevant facts, in the Seismic & Digital Concepts holding if such facts were of no significance to its decision.

More importantly, however, is the Texas Supreme Court holding in Mid-Continent Refrigerator Company v. Tackett, supra. In that case, the Supreme Court held that January 2, 1978, though not listed under Article 4591, V.A.C.S., as a state holiday, was to be considered a legal holiday for procedural purposes within the meaning of Rule 4 T.R.C.P. The Supreme Court ultimately based its decision on the fact that state holidays are directly related to the appropriation of funds for hours and days of work by state personnel from the State Treasury. The state legislator apparently considered the relation of December 24, 1979, to the appropriation of funds for hours and days of work by state personnel from the State Treasury in the Appropriations Act effective on December24, 1979. General and Special Laws of Texas, vol. 2, chapter 843, Section 7, paragraph b, at 2901, provides in relevant part.

"Employees of the State shall, without deduction in salary, be entitled to, in addition to leave provided in this Section, vacation or leave time on . . . December 24."

The above legislation combined with the fact that the Harris County District Clerk's office was closed due to December 24, 1979, being Christmas Eve and a holiday as interpreted by the County Commissioner pursuant to Article 2372h-1, V.A.C.S., in effect should make December 24, 1979, a holiday for procedural purposes as applied to this Petitioner. To conclude otherwise deprives Petitioner of due process and equal protection of the law.

WHEREFORE, Petitioner prays that his Application be granted and that he be allowed to appeal this cause on the merits.

Respectfully submitted,

R. J. Strong Jr.
3520 Montrose Blvd., Suite 211
Houston, Texas 77006

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument and after being duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 16 day of May, 1980.

Notary Public in and for
Harris County, Texas

My Commission Expires:
Sept. 1981

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Writ of Error has been mailed to Gaylan Nix, Esq., 218 West Little York, Houston, Texas on this 16th day of May, 1980.

R. J. Strong Jr.

R. J. Strong Jr.

NO. 80-889

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MUHAMMAD F. MALIK, Petitioner

V.

HIDDEN VALLEY CIVIC CLUB and
GEORGE A. TURNER, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The 125th Judicial District Court of Harris County, Texas, rendered judgment against Petitioner. (Petitioner's Appendix C, p. 1).

The Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissed Petitioner's appeal for want of jurisdiction in an opinion found at 601 S.W.2d 59 (Tex.Civ.App.-Houston, [1st Dist.] 1980, writ ref'd, n.r.e.).

The Texas Supreme Court denied Petitioner's application for writ of error without written opinion, finding no reversible error. (Petitioner's Appendix A).

JURISDICTION

The Petitioner seeks the jurisdiction of this Court under 28 U.S.C. 1257(3), alleging that following an unfavorable judgment in the trial court he was prohibited by state action from timely filing his motion for a new trial, and contends here that he was capriciously and arbitrarily denied his right to appeal in violation of due process and equal protection of the law (Petition For Writ Of Certiorari, p. 22); somehow attempting to convince this Court that the filing of a motion for new trial is a prerequisite for appeal in the State of Texas, which it is not. Rule 324, Texas Rules of Civil Procedure.

Since Petitioner apparently now agrees with the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas which found, in Malik v. Hidden Valley Civic Club et al, 601 S.W.2d

59 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd, n.r.e.), that December 24, 1979 was not a legal holiday and was therefore the last day to timely file his motion for a new trial (Petition For Writ Of Certiorari, p. 19), his sole complaint in this Court is that due to state action he was denied his right to appeal (Petition For Writ Of Certiorari, pp. 17, 22, and 23). The state action complained of is that on December 24, 1979 the Harris County Civil Courts Building was closed (Petition For Writ Of Certiorari, pp. 8, 19, and 20), although such date was not a legal holiday for procedural purposes, and Petitioner was prevented thereby from filing a motion for a new trial.

Assuming arguendo that the Harris County Civil Courts Building was closed for the purpose of Petitioner filing his motion for new trial, he should not be permitted to complain here that he was

denied thereby his right to appeal. For to perfect his appeal the Petitioner merely needed to file an appeal bond with the clerk no later than January 14, 1980. Rules 354, 356(a), 363, and 4, Texas Rules of Civil Procedure. This he failed to do, not because of state action but because of his own inaction. In State of Texas v. Gundstrom, 404 F.2d 644 (1968) it was held that courts will not pass upon a constitutional question although properly presented by the record if there is also present some other ground upon which the case may be disposed.

This Court, therefore, should not recognize probable jurisdiction nor review this case on writ of certiorari, since review is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Rule 19, United States Supreme Court. No such special or important reasons exist here.

CONSTITUTION AND STATUTES

Respondent is not dissatisfied with Petitioner's presentment of "Constitution And Statutes" except that Article 2372h, Texas Revised Civil Statutes should be added and Article 2372h-1, Texas Revised Civil Statutes should be restated for comparison.

Article 2372h, Texas Revised Civil Statutes reads as follows:

"Section 1. In all counties having a population of five hundred thousand (500,000) or more according to the last preceding or any future Federal Census, the Commissioners' Court of the county shall have authority to formulate in the manner hereinafter set out rules and regulations governing the hours of work, vacation, holidays [Respondent's emphasis], sick leave, medical care, hospitalization, compensation and accident insurance,

and deductions for absences with reference to all persons who this Act affects, ...The said rules and regulations when adopted as hereinafter provided shall apply to and govern all deputies, assistants and employees of the county....."

"Section 5. Before adopting any rules or regulation, or revising rules or regulation thereto adopted in connection with...this Act, the Commissioners' Court shall give at least fifteen (15) days notice of such proposed adoption or revision of rules or regulation by publishing a notice at least once in each week for two (2) successive weeks in some newspaper published in the county in which such rules, regulations, or revisions are to be made effective of its intention to do so, and a hearing is to be held before said court at a fixed time and day to be specified in the notice.....The court shall adopt the regulations and direct

their recording upon the minutes, and upon approval thereof, as herein provided, they shall become effective..."
(Enacted 1941, amended 1949.)

Article 2372h-1, Texas Revised Civil Statutes, reads as follows:

"In each county of this State, each elected County or Commissioners' Court, as the case may be, shall have authority to provide for vacations, holidays fixed by state law [Respondent's emphasis], and such leave, without deduction of pay.....Nothing in this Act shall effect existing laws authorizing or regulating...holidays...for county employees, it being the intention of this Act only to provide such authority with respect to employees covered by this Act in counties where it does not now exist."
(enacted 1959.)

STATEMENT OF CASE

This is a deed restriction case wherein the court of first instance ordered the Petitioner to remove a mercury security light from his front yard in a residential subdivision in Houston, Harris County, Texas.

Judgment was signed on the 13th day of December, 1979.

Petitioner filed a motion for new trial on December 26, 1979. Such motion was presented to the court and was overruled without comment on January 28, 1980. (Appendix A). The Petitioner did not at anytime prior to January 28, 1980 attempt to amend such motion or present the original motion to the court. Neither in his motion for new trial nor at the hearing held on January 28, 1980 was mention made by Petitioner of the constitutional deprivation here raised.

On February 22, 1980 -- not yet having filed an appeal bond -- the Petitioner filed a motion in the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, requesting that the time alloted for filing a transcript and statement of facts be extended. (Appendix B). Again, no mention was made therein of the deprivation complained of here.

On February 26, 1980 [which was within thirty (30) days of the overruling of Petitioner's motion for new trial but not within thirty (30) days of the signing or rendition of judgment] Petitioner filed an appeal bond with the District Clerk.

On March 5, 1980 Respondent filed his first amended opposition to extension, pointing-out that Petitioner had failed to timely file his motion for new trial and had failed to perfect his appeal by timely filing the requisite appeal bond

within thirty (30) days of the signing of judgment. (Appendix C).

On March 10, 1980 Petitioner filed his response to Respondent's first amended opposition to such extension. He failed again to complain of the constitutional denial asserted here, but merely contended that December 24 and December 25, 1979 were legal holidays and, therefore, that he had until December 26, 1979 to file a motion for new trial. (Appendix D). On this same day the Court of Civil Appeals extended the time to file the transcript and statement of facts up to and including March 28, 1980.

On March 11, 1980 the Court of Civil Appeals received the transcript but did not file same until April 10, 1980.

On April 10, 1980 the Court of Civil Appeals dismissed the appeal, citing want of jurisdiction. The court held that December 24, 1979 was not a legal holiday

for procedural purposes; that Petitioner was tardy in filing his motion for new trial and filing his appeal bond; and, that the court could not acquire jurisdiction where an appeal bond has not been timely filed. Malik v. Hidden Valley Civic Club et al, 601 S.W.2d 59 (Tex.Civ. App.-Houston [1st Dist.] 1980, writ ref'd, n.r.e.).

Later that same day Petitioner filed his motion for rehearing in the Court of Civil Appeals, alleging for the first time that it was a "legal impossibility" to file his motion for new trial on December 24, 1979 because the clerk's office located in the Harris County Civil Courts Building was closed. (Petitioner's Appendix D, p. 6).

The Court of Civil Appeals overruled without comment Petitioner's motion for rehearing on April 24, 1980.

On June 17, 1980 Petitioner filed

his application for writ of error in the highest court of the state of Texas, the Texas Supreme Court.

On September 10, 1980 the Texas Supreme Court refused Petitioner's application for writ of error, finding no reversible error.

On December 29, 1980 Petitioner's petition for writ of certiorari was docketed in this Court.

In the state of Texas, motions for new trials and appeal bonds are filed with the district clerk, a county employee. Transcripts and statements of fact are filed with the clerk of the Court of Civil Appeals, a state employee. Except for one unusual case [Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (Tex. Sup.Ct.-1979)], the state's legal holidays are designated under Article 4591 of the Texas Revised Civil Statutes. Smith v. Harris County-Houston Ship Chan.Nav.Dist.,

160 Tex. 292, 329 S.W.2d 845 (1959); Suarez v. A. C. Brown, 414 S.W.2d 537 (Tex.Civ.App.-Corpus Christi 1967, writ ref'd.). By virtue of Article 2372h, Tex. Rev.Civ.St., the Commissioners' Court of counties with a population of five hundred thousand (500,000) or more -- such as Harris County, Texas -- have the authority to designate holidays for employees in their county, irrespective of holidays fixed by state law. Under Article 2372h-1, Tex.Rev.Civ.St., the Commissioners' Court of all counties regardless of population have the authority to grant their county employees those holidays fixed by state law. December 24, 1979 was not a state legal holiday (Malik v. Hidden Valley Civic Club et al, supra), however it was designated as a county holiday by the Harris County Commissioners' Court. Therefore, the office of the district clerk's civil division, located in the

Harris County Civil Courts Building, was closed.

It is common knowledge among lawyers in Harris County that the county's switchboard operators have the names of district clerk deputies who may be called in case a pleading must be filed on a county holiday or after normal office hours. One of the district clerk deputies on duty December 24, 1979 for the purpose of filing any pleadings due on that date was Thomas L. Love, Assistant Chief Deputy. The county's switchboard operators would refer any emergency call relative to a deadline filing to Mr. Love. Mr. Love would review the matter and either permit same to be filed at his residence or refer the filing to the district clerk's central bonding office, which was in the Harris County Criminal Courts Building located across the street from the Harris County Civil Courts Building. It is in

this manner that Harris County provides for instruments to be filed twenty-four (24) hours a day, seven (7) days a week. (Petitioner's Appendix D, p. 1).

In addition, the home telephone numbers of both Ray Hardy, District Clerk, and Thomas L. Love, Assistant Chief Deputy, appeared in the white pages of the Greater Houston Telephone Directory on December 24, 1979 and even at this present time.

THE ARGUMENT

PETITIONER WAS NOT PROHIBITED BY STATE ACTION FROM PERFECTING APPEAL.

A motion for a new trial is not a prerequisite to the right of appeal. Rule 324, T.R.C.P. Judgment shall become final after the expiration of thirty (30) days after the date of rendition or signing of the judgment or order overruling an original or amended motion for new trial. Rule 329b(5), T.R.C.P. The appellant shall execute a bond payable to the appellee or to the clerk, and when same is filed within thirty (30) days after rendition of judgment or order overruling motion or amended motion for new trial, the appeal is perfected. Rules 354, 356(a) and 363, T.R.C.P. The Court of Civil Appeals cannot acquire jurisdiction of an appeal where an appeal bond has not been timely filed. Metal Enterprises, Inc. v. Don Love, Inc., 559 S.W.2d 90

(Tex.Civ.App.-Houston [1st Dist.] 1977, no writ); Washington v. Golden State Mut. Life Ins.Co., 408 S.W.2d 277 (Tex.Sup.Ct.-1966); Malik v. Hidden Valley Civic Club et al, 601 S.W.2d 59 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd., n.r.e.). In computing any period of time prescribed by the Texas Rules of Civil Procedure, the last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday [Respondent's emphasis], in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday. Rule 4, T.R.C.P. A motion for new trial, if filed [Respondent's emphasis], shall be filed within ten (10) days after the judgment or other order complained of is rendered. Rule 329b(1), T.R.C.P.

Assuming arguendo that Petitioner's attorney did go to the Civil Courts Building on December 24, 1979 and found it

locked, and assuming further that the enactment of Article 2372h and the District Clerk's filing procedures on those county holidays which are not state legal holidays precluded Petitioner from filing his motion for a new trial on December 24, 1979 (the tenth day), Petitioner should not now be permitted to complain here that he was denied thereby his right to appeal, for to perfect his appeal he merely needed to file an appeal bond with the District Clerk no later than January 14, 1980; a task easy enough for one who allegedly was "capriciously and arbitrarily denied his right to appeal in violation of due process and equal protection of the law." (Petition For Writ Of Certiorari, p.22). This Petitioner failed to do not because of the state's action, but because of his own inaction.

PETITIONER WAS DILATORY IN PRESENTING MOTION FOR NEW TRIAL TO COURT

A motion for new trial, if filed [Respondent's emphasis], shall be filed within ten (10) days after the judgment or other order complained of is rendered. Rule 329b(1), supra. An original motion for new trial filed within said ten-day period may be amended without leave of the court. Rule 329b(2), T.R.C.P.

The failure of a party to file a motion for new trial within the ten-day period prescribed by subdivision 1 of Rule 329b shall not deprive the trial court of judisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered. Rule 329b(5), T.R.C.P. Therefore, under Rule 329b(5), a trial court is not precluded from acting on a new trial motion filed after the prescribed ten-day period as long as the court acts on the motion prior to judgment becoming final. Broussard v. Dunn,

568 S.W.2d 126, 128 (Tex.Sup.Ct.-1978). Once having allegedly been denied his right to file his motion for new trial within the ten-day period, Petitioner filed same on December 26, 1979 but neglected to present it to the court within the thirty-day period prescribed by Rule 329b(5), but waited until January 28, 1980 to present same to the court. (Petition For Writ Of Certiorari, p. 12). Hardly an act of one unconstitutionally deprived of filing a motion for new trial and appealing an unfavorable judgment.

It shall be the duty of the proponent of an original or amended motion for new trial to present the same to the court within thirty (30) days after same is filed. Rule 329b(4), T.R.C.P. Even if December 24, 1979 had been a legal holiday for purposes of Rule 4 and Petitioner had timely filed his motion for new trial, he would have nevertheless failed to present

same within the thirty (30) days as prescribed by Rule 329b(4). January 25, 1980 was a Friday and the thirtieth day. As stated above, Petitioner did not present such motion for new trial until the following Monday, January 28, 1979 -- another example of Petitioner's inaction, not state action.

Rule 329b(4), supra, provides that at the discretion of the judge, an original motion or amended motion for new trial may be presented or hearing thereon completed after such thirty-day period. In that Petitioner did not file his motion for new trial within ten (10) days after judgment was rendered, and since the motion was not presented to nor entertained nor acted upon by the trial court within thirty (30) days after the judgment was rendered, the motion was ineffective for any purpose. Berger v. Greve, 303 S.W.2d 467 (Tex.Civ.App.-1957,

writ ref'd., n.r.e.); Broussard v. Dunn, supra. Petitioner was simply dilatory, and it was this inaction that was the cause of the Court of Civil Appeals not acquiring jurisdiction, rather than some action on the part of the state of Texas.

PETITIONER WAS NOT PROHIBITED BY STATE ACTION FROM FILING HIS MOTION FOR NEW TRIAL

Article 1820, Texas Revised Civil Statutes, provides:

> "The judgment of the court of civil appeals shall be conclusive in all cases on the facts of the case."

Article 1822, Texas Revised Civil Statutes, provides that:

> "Said Courts [Courts of Civil Appeals] shall have power, upon affidavit or otherwise as by the court may be thought proper, to ascertain such matters of fact as may be necessary to the proper exercise of jurisdiction."

The Court of Civil Appeals first determined by state substantive law that December 24, 1979 was not a "legal" holiday for purpose of Rule 4, T.R.C.P., and

that the court did not have jurisdiction for want of a timely filed appeal bond. It then determined "upon affidavit or otherwise" (Article 1822, supra) that the facts were against Petitioner in his contention that "it was a legal impossibility to file a motion for new trial or any other motion or pleading due to Ray Hardy's office being closed". (Petitioner's Motion For Rehearing, Petitioner's Appendix D, p.6). The Court of Civil Appeals has the duty of determining its jurisdiction and taking notice of lack of jurisdiction when disclosed by the record. Consolidated Cas.Ins.Co. v. Wade, 373 S.W.2d 841 (Tex.Civ.App.-1963, writ ref'd., n.r.e.).

The Court of Civil Appeals, which has been located in the Harris County Civil Courts Building for many years, certainly was aware of the facts set forth in Districk Clerk Ray Hardy's affidavit (see

Petitioner's Appendix D, p. 1) and of the District Clerk's procedure or practice of filing pleadings or instruments after normal office hours and on holidays, when the court "upon affidavit or otherwise" (Article 1822, supra) learned of Petitioner's allegation regarding the Courthouse being closed and Petitioner's alleged inability to file his motion for new trial on that date. Having weighed Petitioner's facts, the Court of Civil Appeals determined the facts to be against Petitioner and overruled his motion for rehearing, or in effect finding that Petitioner could have filed his motion for new trial on December 24, 1979 in accordance with the accepted practice of filing pleadings and other instruments on county holidays or after normal office hours. Petitioner's contention that he was prohibited from filing his motion for new trial was presented to the Court of

Civil Appeals in Petitioner's Motion For Rehearing and Petitioner's Amended Motion For Rehearing: that court found against the Petitioner, as this Court should.

NON-FEDERAL VERSUS FEDERAL QUESTION

Before considering Petitioner's Fourteenth Amendment contentions of denial of due process and equal protection, the Court should deny Petitioner's Petition For Writ Of Certiorari without considering same. For in Fox Film Corp. v. Muller, 296 U.S. 207, 210; 56 S.Ct. 183; 80 L.Ed. 158, this Court held as follows:

> "Where the judgment of a state court rests upon two grounds, one which is federal and the other non federal in character, our jurisdiction fails if the non federal ground is independent of the federal ground and adequate to support the judgment."

In State of Texas v. Gundstrom, 404 F.2d 644 (1968), it was held that courts will not pass upon a constitutional question although properly presented by the record

if there is also present some other ground upon which the case may be disposed. The court further held that if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of general law, the court will decide only the later.

Respondent contends that the case at bar should be decided against Petitioner at this point on the non-federal grounds without reaching Petitioner's constitutional or federal grounds.

PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION

Petitioner contends that due to December 24, 1979 being a county holiday by virtue of the power granted by Article 2372h-1, Tex.Rev.Civ.St., he was prohibited by state action from filing his motion for new trial on a day that was not a state legal holiday, and that such prohibition was in violation of due process

and equal protection. Actually Harris County is covered by Article 2372h rather than Article 2372h-1, since said county has a population in excess of 500,000 and its Commissioners' Court has adopted and promulgated same.

First, it would be impossible in an equal protection context for a state to custom tailor every regulation to take into account mode of operation, skill, and trustworthiness of each person subject to regulation. Alladin's Castle, Inc. v. City of Mesquite, 434 F.Supp. 473. In Kimble v. Northwestern Nat.County Mut. Ins.Co., 518 S.W.2d 877 (Tex.Civ.App.-1975, writ ref'd., n.r.e.) the clerk of the trial court failed to give notice to appellant that judgment had been entered against him as required by Rule 306d, T.R.C.P. As a result of such failure, the appellant failed to file his appeal bond timely and the Court of Civil Appeals could not

acquire jurisdiction, for the timely filing of an appeal bond is mandatory and jurisdictional and cannot be waived. Glidden Company v. Aetna Casualty & Surety Company, 155 Tex. 591, 291 S.W.2d 315, 318 (1956); Nelson v. State, (Tex.Civ.App.-Waco, 1973, no writ hist.), 497 S.W.2d 538,539. The Kimble court held, at page 878, "that a clerk's failure to give notice in accordance with the provisions of Rule 306d does not excuse a party's failure to meet the timetables prescribed by Rule 356."

Second, due process was met in the case at bar by the notice provisions of Articles 2372h and 4591, supra. Petitioner was put on notice by the minutes of Commissioners' Court that December 24, 1979 was a county holiday, and he was put on notice by Article 4591, Tex.Rev.Civ.St., that December 24 was not a state "legal" holiday for procedural purposes (Rule 4,

T.R.C.P.). If this caused Petitioner concern, he should have been more diligent and made inquiries if he was not aware of the widely known practices regarding filing of pleadings on county holidays. In fact, this Court held in Wainwright v. Sykes, 433 U.S. 72, 90, 96 S.Ct. 1708, 48 L.Ed.2d 149, as follows:

> "if a...defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making his objection."

The Petitioner, being on notice of Articles 2372h and 4591, supra, and having discovered that the Harris County Civil Courts Building was locked on December 24, 1979, and that he was about to be denied his right to appeal, should have followed state procedure and filed his appeal bond within thirty (30) days of rendition of the trial court's judgment. Regardless of Petitioner's dilemma it is not within

the province of an appellate court to declare unconstitutional all that appears to be unfair and not wise exercise of powers of government. Martin v. State, 395 S.W.2d 631, cert. den., 382 U.S. 928, 86 S.Ct. 307, 15 L.Ed.2d 340.

On December 24, 1979 there were eighteen (18) civil district court (excluding family district courts) located in Harris County, Texas; all within the Harris County Civil Courts Building. Each month on a rotating basis, one District Court Judge is named to serve as presiding judge. Such presiding judge, among other things, grants or denys applications for ex parte temporary restraining orders where emergency need arises. In the event an emergency need should arise after normal office hours, during the weekends, or on holidays, it is common knowledge and practice among lawyers in Harris County that to seek a temporary restraining order they

call the county switchboard operator to obtain the names of the deputy district clerk on standby and the presiding judge, so that an application can be filed and presented to the presiding judge for signature. A similar situation and procedure confronted Petitioner's counsel on December 24, 1979. Due process does not require that a litigant or his attorney be put on notice of every action that he must take in pursuing his case. In fact, it has been held that due process does not require a litigant to be put on notice of the duly adopted and promulgated rules of the court. Rhodes v. City of Austin, 584 S.W.2d 917 (Tex.Civ.App.-1979, writ ref'd., n.r.e.).

A state is not required to provide a means of appeal in order to meet demands of due process, and admittedly when a state does provide means for appeal it cannot put limitations on it which are

discriminatory, arbitrary and totally unrelated to any possible state purpose. Compton v. Naylor, 392 F.Supp. 575. However, discrimination alone is not enough, it must be invidious discrimination. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956). The right to equal protection of the laws is not denied by a state court where the same course of procedure applied to the person in question would have been applied to any other person in the same state under similar circumstances. Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805, 43 L.Ed. 91 (1898). It is not sufficient to show only that the law is enforced against some and not others; there must be a showing of actual and purposeful discrimination against the individual himself or against a suspect classification in which he falls (such as wealth, religion, or race) with no proper justifying governmental purpose

in such classifications. Snowden v. Hughes, 321 U.S. 1,8, 64 S.Ct. 397, 88 L.Ed. 497 (1944); SuperX Drugs of Texas, Inc. v. State, 505 S.W.2d 333 (Tex.Civ. App.-Houston [1st Dist.] 1974, no writ). Although Petitioner hints at race and religion (Petition For Writ Of Certiorari, pp. 1, 17) and inserts a copy of his Petition For Removal In Civil Case in his Appendix (Petitioner's Appendix D, p.2) in an apparent effort to show racial and religious bias (Petitioner's Appendix D, pp. 2, 4), he failed there and fails here to show same. After hearing Respondent's Motion To Remand, filed following Petitioner's Petition For Removal of Civil Case, the United States District Court for the Southern District of Texas (Houston Division) by written order, remanded same to the state court stating, inter alia, (Appendix E, p 4) as follows:

"The petitioner's claim of a

> denial of his constitutional rights states a cause of action in due process rather than equal protection. The petitioner's argument is that the state court acted unreasonably in not construing December 24, 1979 as a state holiday. He attacks the procedure in effect that day whereby allegedly some attorneys knew that the clerk's office would be open and others did not. However, the petitioner clearly stated that this unequal access was not based on race nor national origin since veteran black attorneys also might have known that the office was open that day. His argument is thus a due process claim of an unreasonable procedure rather than a claim of a denial of equal rights."

No discrimination in any respect was alleged prior to trial in the court of first instance and no attempt was made prior to trial to remove same to the federal courts. Purported discrimination appeared only after Petitioner failed to perfect his appeal. The burden of showing intentional and purposeful discrimination in application of the law against an individual to prove denial of due process is a heavy one. Armendariz v. State, 529 S.W.2d 525 (Tex.Crim.App.) A discriminatory

purpose is never presumed. Tarrance v. State of Florida, 188 U.S. 519,520 (1903)

It would not have mattered who Petitioner or his attorney was, the doors to the Harris County Civil Courts Building were locked against everyone on December 24, 1979 except to those who knew or, being diligent that day, learned the accepted practice of filing pleadings on county holidays, after normal office hours, and on weekends. No intentional act has been shown. The county had a right and a purpose to give its employees a holiday on Christmas Eve, December 24, 1979. Article 2372h, supra. No purposeful or intentional discrimination has been shown against Petitioner. In fact by his own admission, Petitioner "clearly stated this unequal access was not based on race nor national origin" (Appendix E, p. 5), so he should not now be permitted to complain of denial of equal protection.

PETITIONER SHOULD NOT BE EXCUSED OF STATE PROCEDURAL DEFAULT

The Petitioner should not be excused of his state procedural default. The State of Texas has a purpose in not permitting an appeal where an appeal bond has not been timely filed. That purpose is to put an end to litigation, and to permit the prevailing party to have confidence in and rely upon the judgment. Thus, as stated by this Court in Henry v. State of Mississippi, 379 U.S. 443, 447, 85 S.Ct. 564, 567:

> "These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. [Respondent's emphasis] In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

It is clear that the State of Texas has a legitimate purpose in insisting on compliance with the timely filing of an appeal bond or the timely filing of a motion for

new trial and presentment thereof to the Court, and that purpose is the finality of judgments, writs, and processes issued by its courts.

Therefore, Petitioner should not be excused of his procedural default.

CONCLUSION

Respondent prays that Petitioner's Petition For Writ Of Certiorari, as filed herein, be denied.

Respectfully submitted,

GAYLEN L. NIX
Counsel for Respondent
126 East Parker Road
Houston, Texas 77076
(713) 697-4871
State Bar No. 15040000

APPENDIX A

NO. 79-20,713

HIDDEN VALLEY CIVIC CLUB AND GEORGE A. TURNER	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	*	125th JUDICIAL
MUHAMMAD A. MALIK	*	DISTRICT

ORDER DENYING MOTION
FOR NEW TRIAL

ON the 28th day of January, 1980, came on to be heard in the above styled and numbered cause Defendant's Motion For New Trial, and the parties having announced ready, the court proceeded to hear the motion, and all the evidence having been presented, both sides rested, and the arguments of counsel having been heard by the Court, the Court is of the opinion that such motion should be denied; accordingly

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Defendant's Motion For New Trial be and is hereby denied.

All costs of Court with respect to

C-O-P-Y

Defendant's said Motion For New Trial is hereby taxed against the Defendant, for which let execution issue unless timely paid.

SIGNED AND ORDERED on this 28th day of January, 1980.

/s/ CHARLES L. PRICE
JUDGE PRESIDING

APPROVED AS TO FORM:

/s/ GAYLEN L. NIX
Gaylen L. Nix, Attorney for Plaintiff
218 West Little York Road
Houston, Texas 77076
697 - 4871
State Bar No. 15040000

C-O-P-Y

APPENDIX B

NO. _____

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME
JUDICIAL DISTRICT

MUHAMMAD F. MALIK,
Appellant,

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER,
Appellees

MOTION FOR EXTENSION OF TIME
TO FILE TRANSCRIPT AND STATEMENT
OF FACTS

TO THE HONORABLE JUDGES OF SAID COURT:

Muhammad F. Malik, Appellant in the above entitled and numbered cause, respectfully moves the court for an extension of time within which to file the transcript and statement of facts with the clerk of the court, and in support of said motion shows:

I.

The District Court of Harris County, Texas, for the 125th Judicial District of Texas, rendered judgement in said cause

C-O-P-Y

on December 13, 1979. Said court entered its order overruling Appellant's Motion for New Trial on January 28, 1980.

II.

Appellant has been unable to file said transcript and statement of facts within the required 60 day period because of the short period of time between the overruling of said motion for new trial and the expiration of said 60 day period.

WHEREFORE, Appellant prays that this court grant an extension of time within which to file the transcript and statement of facts herein, to and including March 28, 1980.

Dated February 9, 1980.

Respectfully submitted,

/s/ R. J. STRONG, JR.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
(713) 529-4868

C-O-P-Y

THE STATE OF TEXAS X

COUNTY OF HARRIS X

BEFORE ME, the undersigned authority, on this day personally appeared R. J. Strong Jr., known to me to be the person whose name is subscribed to the foregoing instrument being first by me duly sworn, acknowledged that he signed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 9th day of February, 1980.

/s/ BILLIE R. STRONG
Notary Public in and for
Harris County, Texas

My Commission Expires:
June 22, 1981

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension of Time to File Transcript and Statement of Facts has been mailed to opposingcounsel, Mr. Gaylen L. Nix, 218 W. Little York Road, Houston, Texas on this 9th day of February, 1980.

/s/ R. J. STRONG JR.
R. J. Strong Jr.

C-O-P-Y

APPENDIX C

MUHAMMAD F. MALIK, Appellant
VS.
GEORGE A. TURNER, Appellee

IN THE COURT OF CIVIL APPEALS FOR THE 1st SUPREME JUDICIAL DISTRICT OF TEXAS

NO. 17694

APPELLEE'S FIRST AMENDED OPPOSITION TO MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT

TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now GEORGE A. TURNER, Appellee in the above styled and numbered appeal, and opposes the appellant's motion for extension of time for filing of transcript and statement of facts for the following reasons:

1. Rule 354 of the Texas Rules of Civil Procedure requires the appellant to execute an appeal or cost bond payable to the appellee or to the clerk in the sum of $500.00 unless excused by law. Rule 356 requires the bond be filed with the clerk within thirty days after rendition of judgment or order overruling motion for

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new trial, or after motion for new trial is overruled by operation of law. An appeal can only be perfected once, either by giving of a cost bond or by filing of a proper affidavit under Rule 355. The requirement that a cost bond be filed within thirty (30) days, as aforesaid, is mandatory and the Court of Civil Appeals cannot acquire jurisdiction of an appeal where an appeal or cost bond has not been timely filed. Metal Enterprises, Inc. v. Don Love, Inc., 559 S.W.2d 90 (Tx.Civ.App. -Houston(1st)-1977, no writ history); Martinez v. Euler, 524 S.W.2d 814 (Tx.Civ. App.-Corpus Christi, 1975, no writ history). The judgment in this case was rendered on the 13th day of December, 1979, and the appellant gave notice of appeal therein. Then on December 26, 1979, the appellant filed his motion for a new trial. The trial overruled this motion for new trial on January 28, 1980, although the trial

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court had lost its jurisdiction. The appellant filed his appeal or cost bond on February 25, 1980 (although appellee has received no notice thereof as required by Rule 354(b)). The appellant was required to file his motion for a new trial on December 24, 1979, which was within the ten (10) of rendition of the judgment as required by Rule 329b. Thus this Court does not have jurisdiction in that the appellent was required to file his appeal or cost bond within thirty (30) days of the rendition of the judgment, to wit: by January 12, 1980. Therefore, the Court should not extend the time of filing the transcript, but should require it to be filed within sixty days from the rendition of the final judgment as required by Rule 386, which would be by March 12, 1980. Upon the filing of such transcript the Court should take jurisdiction only to dismiss the appeal for want of jurisdiction

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for the reason set forth above.

2. The appellants said Motion to Extend fails to state facts which tend to show why he has been unable (or will be unable) to file said transcript and statement of facts as specified by the Rules of Civil Procedure.

3. Appellant's request for additional time is dilatory only. The appellant has failed to post a Supersedeas Bond to suspend the execution of the judgment ($2,000.00 attorney's fees) and to stay the force and effect of the trial court's mandatory injunction to remove a certain light pole from his front yard, hoping that the trial court will not hold him in contempt for his failure to obey the Court's order merely because he filed an appeal, thereby causing the appellee additional expenses for filing a motion for contempt without success, and further hoping that the appellee's execution on

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the money portion of such Judgment will be returned Nulla Bona. Thus by being dilatory in the Court of Civil Appeals, the appellant will effectively defeat the trial court's order which is designed to protect the appellee from suffering irreparable harm.

Wherefore, Appellee prays that the appellant's time, as provided by the Rules of Civil Procedure, for filing the transcript and statement of facts in this case not be extended past March 12, 1980, and in no event past March 28, 1980, which is sixty (60) days after the trial court overruled appellant's motion for a new trial without jurisdiction.

Respectfully submitted,

/s/ GAYLEN L. NIX
Gaylen L. Nix
Attorney for Appellee
218 West Little York
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(713) 697-4871
State Bar No. 15040000

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APPENDIX D

NO. 17694

IN THE COURT OF CIVIL APPEALS
FOR THE 1ST SUPREME JUDICIAL DISTRICT

MUHAMMAD F. MALIK,
Appellant

VS.

HIDDEN VALLEY CIVIC CLUB
and GEORGE TURNER
Appellees

RESPONSE TO APPELLEE'S FIRST AMENDED OPPOSITION TO MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW Muhammad F. Malik, Appellant in the above styled and numbered cause, and files this his response, and in support thereof would respectfully show the court the following:

I.

The District Court of Harris County, Texas, for the 125th Judicial District, rendered judgement in said cause on December 13, 1979. Appellant timely filed his Motion for New Trial in said district court on December 26, 1979. Said district

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court entered its order overruling Appellant's Motion for New Trial on January 28, 1980.

II.

Appellee is under the mistaken belief that Appellant's Motion for New Trial should have been filed no later than December 24, 1979. However, since the Supreme Court of Texas handed down its decision in Mid-Continent Refrigerator Company v. Tackett, 584 S.W.2d 705 (July 25, 1979), it is clear that December 24, 1979, and December 25, 1979, were both legal holidays for procedural purposes. See Paragraph B, Section 7, Article 9, HB 558; and, Article 2372h-1, Vernon's Revised Civil Statutes.

III.

Accordingly, Appellant had thirty (30) days after January 28, 1980, to file his appeal bond which, at the latest would have been February 27, 1980. Appellant filed his appeal bond, in the amount of

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$500.00, before February 27, 1980, which satisfies the time limit of Rule 356(a) of the Texas Rules of Civil Procedure.

IV.

On February 28, 1980, following a telephone call to opposing counsel on February 26, 1980, informing him of the filing of an appeal bond, the undersigned attorney notified said opposing counsel of the filing of the appeal bond in a letter. Unless due to a failure of the U.S. mail service, said opposing counsel should have received said notification on February 29, 1980, or on March 1, 1980. In any event, opposing counsel has received actual notice of the date of filing of said bond.

V.

Appellant's request for an extension of time is only based upon the court reporter of the 125th District Court's belief that the portion of the statement of facts requested by Appellant will be

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prepared about that date.

WHEREFORE, Appellant prays that he be given until March 28, 1980, to file the transcript and statement of facts with the Clerk of this Honorable Court, the time estimated by the court reporter of the 125th District Court that he will have the statement of facts prepared for filing, and that Appellee's Opposition to Motion for Extension of Time for Filing Transcript be in all things overruled.

Respectfully submitted,

/s/ R. J. STRONG JR.

R. J. Strong Jr.
3520 Montrose Blvd.
Suite 211
Houston, Texas 77006
(713) 529-4868
State Bar No.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Appellee's First Amended Opposition to Motion for Extension of Time for Filing Transcript has been mailed to Gaylen L. Nix, Esq., 218 West Little York, Houston, Texas on this 10th day of March, 1980.

/s/ R. J. STRONG JR.
R. J. Strong Jr.

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HIDDEN VALLEY CIVIC CLUB and GEORGE A. TURNER, Respondents	
VS.	CIVL ACTION NO. H-80-806
MUHAMMAD F. MALIK, Petitioner.	

ORDER

Came on to be heard respondent's Motion to Remand requesting this Court to remand this case to the 125th District Court of Harris County, Texas, from which it was removed. For the following reasons, the Court GRANTS the respondent's motion.

This action was originally filed in the 125th District Court of Harris County, Texas, by the Hidden Valley Civic Club and George A. Turner, respondent herein, to enforce certain deed restrictions applying to the lot of the petitioner, Muhammad F. Malik. That case was heard on October 15,

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1979, before a jury, and as a result of the jury's verdict the trial judge issued an Order of Permanent Injunction on December 13, 1979. This Order required the petitioner to remove a certain utility structure from his lot and to pay the respondent, George A. Turner, the sum of $2,000.00 in attorney's fees and costs of court. Respondent Hidden Valley Civic Club was dismissed from the case.

Thereafter, the petitioner filed a motion for a new trial which was overruled on January 28, 1980. The trial court judge found that the petitioner had not filed his motion within the required ten (10) day period. The petitioner argues that his motion was timely since December 24th should have been considered a holiday under state law and should not have been counted in determining the expiration date of the ten (10) day time period. The petitioner's appeal to the Court of Civil Appeals, First

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District (Houston), was similarly dismissed on April 10, 1980, for lack of jurisdiction on the basis that the petitioner's appeal bond had not been timely filed.

On February 27, 1980 the petitioner filed a supersedeas bond in the sum of $2,500.00 to stay execution upon the $2,000.00 money judgment and costs of court. However, the petitioner did not request the state court to set a supersedeas bond to stay the court's order of permanent injunction. On March 10, 1980, respondent Turner filed a motion requesting the state court to find the petitioner in contempt of court for refusing to remove the offending utility structure pursuant to the Court's December 13, 1979 Order. On April 11, 1980, the petitioner filed his petition for removal in this Court claiming jurisdiction under 28 U.S.C. § 1443(1).

The petitioner argues that the state

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court proceedings denied him certain constitutional and statutory rights, specifically 42 U.S.C. §§ 1981, 1983, and 2000a. However, in order to remove a state court proceeding to federal court under 28 U.S.C. § 1443(1), the petitioner must show that the right allegedly denied to him arises under federal law providing for specific civil rights stated in terms of racial equality, and that the petitioner is unable to enforce these rights in state courts. Johnson v. Mississippi, 421 U.S. 213 (1975). The Court finds that the petitioner has failed to make either showing.

The petitioner's claim of a denial of his constitutional rights states a cause of action in due process rather than equal protection. The petitioner's argument is that the state court acted unreasonably in not construing December 24, 1979 as a state holiday. He attacks the procedure in effect that day whereby allegedly some

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attorneys knew that the clerk's office would be open and others did not. However, the petitioner clearly stated that this unequal access was not based on race nor national origin since veteran black attorneys also might have known that the office was open that day. His argument is thus a due process claim of an unreasonable procedure rather than a claim of a denial of equal rights.

Furthermore, the petitioner has not demonstrated that he is unable to enforce the denied federal rights in state court. The petitioner could have obtained a stay not only of the money judgment but of the order of permanent injunction as well by following the procedures set out in Rule 364(e) of the Texas Rules of Civil Procedure. Had he done so, the petitioner would not now be faced with a contempt proceeding for failing to remove the offending utility pole. Moreover, the

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petitioner still has available to him the right to seek review by the Supreme Court of the State of Texas on the question of the alleged violation of his due process rights in the filing of his motion for a new trial.

Consequently, the petitioner has failed to establish that 28 U.S.C. § 1443(1) allows him to remain in federal court since he is unable to demonstrate that he cannot enforce in the state courts his right of equal protection as a citizen of the United States.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that the respondent's Motion to Remand is GRANTED.

DONE at Houston, Texas, this 6 day of June, 1980.

/s/ GABRIELLE K. McDONALD
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent George A. Turner hereby certifies that on the 28th day of January, 1981, three (3) copies of Respondent's Response To Petition For Writ Of Certiorari was served upon counsel for Petitioner by mailing same to him at his address of record by U. S. Certified Mail No. P20 139774 9, return receipt requested, postage prepaid.

GAYLEN L. NIX
Counsel for Respondent